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ARTICLE

LEAVING THE BENCH, 1970–2009: THE CHOICES FEDERAL JUDGES MAKE, WHAT INFLUENCES THOSE CHOICES, AND THEIR CONSEQUENCES

STEPHEN B. BURBANK,† S. JAY PLAGER†† & GREGORY ABLAVSKY†††

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† David Berger Professor for the Administration of Justice, University of Pennsylvania.

†† Circuit Judge, United States Court of Appeals for the Federal Circuit.

††† Sharswood Fellow in Law and History, University of Pennsylvania Law School; J.D., 2011, Ph.D. Candidate, 2014 (American Legal History), University of Pennsylvania.

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> For people of influence in any walk of life, from corporate leaders to sports stars, the question of when to leave the stage is a crucial one. Do you go out at the top of your game, giving up any shot at further glory? Or do you dig in until the end, at the risk of tarnishing a distinguished career?[1]

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[1] John Jurgensen, *When to Leave the Stage*, WALL ST. J., Dec. 3, 2010, at D1.

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INTRODUCTION

The Constitution of the United States provides that the judges of courts that exercise the judicial power of the United States are entitled to office for life, subject only to a requirement of "good Behaviour," with a compensation "which shall not be diminished during their Continuance in Office."[2] In order to safeguard the independence of the federal judiciary, the Founders specified that, once appointed, a federal judge could be removed from office only by impeachment for and conviction of "Treason, Bribery, or other high Crimes and Misdemeanors."[3]

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[2] U.S. CONST. art. III, § 1.
[3] *Id.* art. II, § 4.

During the first eighty years of the national government, there were three ways to leave the federal bench: removal following conviction after trial on articles of impeachment, resignation, and death. None of them entitled the judge (or his heirs) to any financial benefits. There was no provision for retirement or disability. Today, federal judges can still resign without financial benefit or remain in regular active service until death. Since 1869, however, Congress has recognized that the country's interest in an experienced and effective national judiciary is best served by providing judges with additional alternatives. Initially, the only other alternative was retirement with an annuity after substantial service and attainment of a specified age. More recently, Congress added the alternative of service in senior status—retaining the office but, at the judge's option, taking a decreased workload, again after substantial service and attainment of a specified age.[4] Like resignation and retirement, taking senior status creates a vacancy on the judge's court, enabling the President to appoint another individual to serve on that court.

Judges who retain the office, either by remaining in regular active service or by taking senior status, are subject to a number of restraints on their activities imposed by statute or by the Code of Conduct for United States Judges, restraints that are not applicable to citizens generally. These include a prohibition against the practice of law, specified limits on outside income, and restrictions on various types of public service activities and most types of political activity. A retired judge relinquishes the office and as a consequence, like a judge who resigns, is not subject to any of the restraints applicable to serving judges.

The research underlying this article was inspired in part by a study of resignations from the federal bench conducted for the National Commission on Judicial Discipline and Removal, which Congress created in 1990 and on which two of the authors served as appointed members.[5] As part of its research program, the Commission secured an analysis of all resignations from the federal bench between 1789 and 1992, with the goal of determining, among other things, which of them were effectively *involuntary* because they occurred in the shadow of threatened impeachment or criminal

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[4] For the history of the statutory provisions governing retirement, senior status, and disability, see *infra* Part I.

[5] *See* REPORT OF THE NATIONAL COMMISSION ON JUDICIAL DISCIPLINE AND REMOVAL i-v (1993); *see also* Stephen B. Burbank & S. Jay Plager, *Foreword: The Law of Federal Judicial Discipline and the Lessons of Social Science*, 142 U. PA. L. REV. 1, 2-10 (1993) (describing the origins, statutory mandate, and research program of the Commission).

prosecution.[6] The Commission did not address, however, what paths judges have taken when given a *voluntary* choice to remain in regular active service or, if eligible, to serve in senior status or retire.

The research underlying this article was also inspired by our recognition that, almost twenty years after the Commission issued its report, the judiciary confronts new challenges. Federal judicial caseloads have risen dramatically, and the number of Article III judges in regular active service and the compensation those judges receive have not kept pace with the workload or inflation. These developments may have adverse consequences for the institution, and recent economic conditions have exacerbated budgetary pressures already exerted by Congress on the institutional judiciary.

Taking account of these developments, we determined that it would be useful to bring the Commission's work on judicial resignations up to date and to take a broader look at the tenure of federal judges and the influences that affect it. For that purpose we chose to study the choices federal judges have made in the period from 1970 through 2009. Because the Supreme Court has been studied extensively, and because the Justices are subject to somewhat different rules and have somewhat different incentives for remaining on or departing from the bench, we focused our research on the judges who serve or have served on federal district and circuit courts.

Thus, one goal of the research on which this Article is based has been to examine the reasons why, for the last four decades, some federal judges have decided to resign—leave the bench before becoming eligible for an annuity—and why, among those eligible through age and service, some have elected to remain in regular active service, while others have chosen one or another (sometimes more than one) of the available alternatives—service in senior status and retirement.

These decisions have personal consequences for the individuals who make them, but they also have consequences, perhaps far-reaching, for the institution of the judiciary and for the society as a whole. Thus, another goal of our study has been to identify what those consequences are or may be.

This article is organized in six parts. Part I reviews the historical development of the statutory scheme governing the choices the law affords.

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[6] *See* Emily Field Van Tassel, *Why Judges Resign: Influences on Federal Judicial Service, 1789 to 1992*, *in* 2 RESEARCH PAPERS OF THE NATIONAL COMMISSION ON JUDICIAL DISCIPLINE AND REMOVAL 1137 (1993). A revised version of this report appears as Emily Field Van Tassel, *Resignations and Removals: A History of Federal Judicial Service—and Disservice—1789–1992*, 142 U. PA. L. REV. 333 (1993) [hereinafter Van Tassel, *Resignations and Removals*].

Beginning with Part II, we present the results of our research. In that part, we bring the Commission's work up to date by examining resignations from the bench during the period of study. Part III, which explores service in senior status, is the heart of this article for two reasons. First, far more judges chose service in senior status than all of the other options combined during the period of our study. Second, we present in that part a wealth of information concerning the work and working conditions of federal judges that are as pertinent to other choices as they are to senior status.

In Part IV, we present our findings concerning retirement, and in Part V, we examine the choice some judges have made to remain in regular active service rather than to assume senior status or retire. Finally, in Part VI we assess the policy implications of our findings and suggest avenues for further research.

I. THE STATUTORY HISTORY OF JUDICIAL CHOICES

Federal judges contemplating the end of their careers currently have four options: retire from the office, retain the office and assume senior status, remain in regular active service, or resign, relinquishing the office.[7] These options developed over time as Congress attempted to reconcile the Constitution's requirements of life tenure and undiminished compensation with the limitations brought on by age.

The Constitution contains no provision for the end of federal judges' careers. In *The Federalist*, Alexander Hamilton defended this omission, arguing, "few there are who outlive the season of intellectual vigor."[8] He criticized the mandatory judicial retirement age of sixty in the New York Constitution as inhumane. Since the United States could not afford pensions, he insisted, the effect of a similar provision in the U.S. Constitution would be to force elderly judges to abandon their sole source of

[7] For the sake of clarity and consistency, we employ terms derived from the modern statutory scheme in 28 U.S.C. §§ 371-374 to describe earlier statutory schemes. Leaving office without any further compensation is called *resignation*; leaving the bench entirely while receiving a pension is termed *retirement*; and ending regular active service while continuing in judicial service is described as *assuming senior status*. This approach is ahistorical, since past statutes employed different terms. Until the 1950s, for instance, what is now referred to by § 371 as "retirement in senior status" was simply called "retirement." *See, e.g.*, Booth v. United States, 291 U.S. 339, 346 (1934) (addressing alternatives available upon satisfying age and service requirements as resignation or retirement). What the statute now calls "[r]etirement on salary"—retirement from the office entirely—was confusingly denominated "resignation" until 1984. *See, e.g.*, *id.*

[8] THE FEDERALIST NO. 79, at 474 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

income.[9] Some politicians disagreed with Hamilton's diagnosis and, on three occasions before the Civil War, sought to enact constitutional amendments providing a mandatory retirement age.[10]

In the absence of any constitutional provision for age or disability, federal judges had only two options for the end of their judicial careers: resign without further compensation or remain on the bench until death. Disability, whether or not acknowledged as such by the disabled judge, was a serious concern. Between 1801 and 1863, Congress enacted four statutes to permit the assignment of judges to perform the duties of disabled district and circuit court judges, but none provided for retirement.[11]

By 1869, the view that the system was untenable had become widespread, particularly because of the heightened demands on the judiciary after the Civil War.[12] A graying Supreme Court—with two Justices in their seventies, one of whom had to be lifted bodily onto the bench—seemed to Congress incapable of handling the increased workload.[13] As a result, the Judiciary Act of 1869 contained, among other reforms, the first provision for federal judicial retirement.[14] Judges who reached the age of seventy and had served for at least ten years could now retire from office on a pension equal to their salary at the time of retirement.[15] During the next thirty years, 20 judges left the bench for reasons of age and health—the same number as in the eighty years before the retirement scheme's creation.[16]

The bill that the House passed in 1869 also sought to address the problem of judicial disability by authorizing disabled judges who had reached the age of seventy but had not satisfied the ten-year service requirement to retire on salary after they had certified their disability.[17] But this provision was not part of the legislation that was finally enacted in that year,[18] leaving Congress to address the issue through case-by-case legislation.[19]

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9 *Id*. at 474-75.

10 Van Tassel, *Resignations and Removals*, *supra* note 6, at 396.

11 *See, e.g.*, Judiciary Act of 1801, ch. 4, 2 Stat. 89, 97; Act of March 2, 1809, ch. 27, 2 Stat. 534; Act of July 29, 1850, ch. 30, 9 Stat. 442; Act of March 3, 1863, ch. 93, 12 Stat. 768.

12 *See generally* STANLEY I. KUTLER, JUDICIAL POWER *AND* RECONSTRUCTION POLITICS (1968).

13 *See* CONG. GLOBE, 41st Cong., 1st Sess. 338 (1869) (statement of Rep. Bingham).

14 Judiciary Act of 1869, ch. 22, § 5, 16 Stat. 44, 45.

15 *See id*. The 1869 Act described leaving office on salary as "resignation," a term that remained in use until 1984. *See supra* note 7.

16 *See* Van Tassel, *Resignations and Removals*, *supra* note 6, at 395-96.

17 *See* CONG. GLOBE, 41st Cong., 1st Sess. 337 (statement of Rep. Bingham).

18 *See* Judiciary Act of 1869, ch. 22, § 5, 16 Stat. 44, 45.

19 *See, e.g.*, Act of June 2, 1876, ch. 118, 19 Stat. 57.

After 1869, federal judges had three options for the end of their careers: resign, remain in office, or fully retire with a pension. A fourth option—have judges leave regular active service, thereby allowing the appointment of an additional judge, but continue to serve on the bench—was contemplated during the debate over the 1869 Judiciary Act and was actually written into the House bill.[20] The Senate rejected this proposal, expressing both anxiety over the possibility of having twenty sitting Supreme Court Justices and discomfort over forcing superannuated judges to continue to work.[21]

Judges did not share this view. They regarded retired judges as a valuable resource for handling the increased workload of the federal courts. The chief judge of the Third Circuit had actually sought to recall a retired judge, but, under the provisions of the 1869 law, could not do so.[22] He therefore urged Congress to create what one congressman described as a "retired list which could be called upon, if [the judges] would be willing to serve, to help out in any emergency in the business and work of the court."[23] This proposal proved uncontroversial because it did not include Supreme Court Justices and, as one congressman noted during debate, it provided "the benefit of such services without any additional expense to the Government."[24] It was enacted in 1919.[25]

Federal judges now had a fourth end-of-career option: they could retain their office but leave regular active service, while continuing to provide judicial service as needed and allowing the appointment of an additional judge.[26] Like fully retired judges, they would receive a pension equal to their salary at the time they left regular active service.[27] The 1919 legislation also included a provision for presidential appointment of another judge in the case of a disabled judge who refused to retire.[28]

These four options—resignation, retirement, service in senior status, and continued regular active service—have remained available since 1919, although Congress has substantially altered key aspects of the scheme. In 1937, the option of service in senior status was extended to Supreme Court

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20 *See* CONG. GLOBE, 41st Cong., 1st Sess. 337 (statement of Rep. Bingham).
21 *See id.* at 574 (statement of Rep. Trumbull).
22 *See* 57 CONG. REC. 428 (1918) (statement of Rep. Graham).
23 *Id.*
24 *Id.* at 368 (statement of Rep. Steele).
25 Act of Feb. 25, 1919, ch. 29, § 6, 40 Stat. 1156, 1157-58.
26 *See id.*
27 *Id.*
28 *Id.* at 1158.

Justices, with the proviso that Justices in senior status could be designated and assigned only for service on the lower federal courts, not the Supreme Court.[29] This limitation addressed concerns that had contributed to the Senate's rejection of the House bill in 1869.[30]

Extending senior status to Supreme Court Justices also ensured that they would have continuing constitutional protection against reduced compensation. When senior status was first proposed in 1869, this concern was met with incredulity that Congress would ever cut judges' pensions.[31] But Congress did just that, cutting Oliver Wendell Holmes's pension in half in legislation intended to address the financial crisis of the Great Depression, and proponents of extending senior service to the Supreme Court argued that Justices deserved the same protection as district and circuit judges.[32] In addition, although the legislation was introduced prior to President Roosevelt's Court-packing plan, proponents acknowledged (and some celebrated) that extending senior status to Supreme Court Justices would make it easier to defeat Roosevelt's plan.[33]

Disability also required congressional attention. The necessity of passing special bills to permit disabled judges to retire before they met the statutory requirements had underscored the inadequacy of the 1869 legislation.[34] Legislation enacted in 1939 exempted judges who certified their permanent disability from the age and service requirements for senior status, enabling them to retire from active service.[35] The law aimed to remedy the perceived problem of disabled judges who remained on the bench until they qualified for a pension.[36]

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29 Act of Mar. 1, 1937, ch. 21, 50 Stat. 24.

30 *See supra* text accompanying notes 20-21.

31 *See* CONG. GLOBE, 41st Cong., 1st Sess. 574 (1869) (statement of Rep. Trumbull) ("If Congress passes a law that a judge who resigns at the age of seventy shall be paid his salary after he leaves it would be such a breach of faith on the part of the nation afterward not to do it . . . ."); *cf. id*. at 337 (stating that retired judges ought not be "liable to be deprived of the pension by a mere repeal of the law") (statement of Rep. Bingham).

32 *See* 81 CONG. REC. 1120 (1937) (statement of Rep. Celler). The Supreme Court held that the salary of a judge serving in senior status (then called "retired") may not be reduced in *Booth v. United States*, 291 U.S. 339, 345 (1934).

33 *See, e.g.*, 81 CONG. REC. 1120 (statement of Mr. Fish).

34 *See*, *e.g.*, 57 CONG. REC. 383 (1918) (statement of Mr. Gard) (advocating a "general rule" instead of "a multitude of special bills"); *supra* text accompanying notes 17-19.

35 Act of Aug. 5, 1939, ch. 433, 53 Stat. 1204. Receipt of a full pension required ten years of service; less service entitled the disabled judge to half his salary. *Id.* § 3.

36 *See* H.R. REP. NO. 76-1323 (1939); S. REP. NO. 76-751 (1939). Judge Posner has noted the oddity under current law that "if the judge is declared disabled against his will and forced to retire,

On several occasions in the mid-twentieth century, Congress refined senior status and judicial retirement. A 1944 law clarified that judges in senior status could serve only when "designated and assigned by" the Chief Justice or a designated circuit judge in regular active service.[37] A 1948 law for the first time differentiated the compensation for retired judges from that for judges in senior status. Although judges who fully retired continued to receive their salary at the time of retirement, judges in senior status now received the "salary of the office" and thus were eligible for subsequent salary increases and cost-of-living adjustments (COLAs).[38] In 1954, judges were allowed to assume senior status either at or after age sixty-five with fifteen years of service or, as previously, at or after age seventy with ten years of service.[39] The provisions for full retirement, however, remained unchanged.[40]

Congress substantially modified judicial retirement again in the 1980s. In 1984, Congress enacted the Rule of 80, broadening the availability of both service in senior status and retirement and equating their requirements. The provision, which remains in effect, allows judges to assume senior status or fully retire at or after age sixty-five as long as the combination of their age and years of service total eighty.[41]

Five years later, congressional debate over a substantial judicial pay raise led to the introduction of a certification requirement for judges in senior status to receive salary increases. The requirement did not apply to COLAs. Responding to press accounts that some judges in senior status performed little work but would nonetheless receive the proposed salary increase,[42] Congress mandated that those judges who wished to continue to receive "the salary of the office" must have a specified minimum workload certified by the chief judge of their circuit and the Chief Justice.[43] Judges in senior status could satisfy this service requirement in one of four ways: they could carry a caseload equal to 25% of a regular active service judge's caseload; they could perform "substantial judicial duties" outside the courtroom, also

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he will receive full pay for life regardless of how few years of service he has." RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 32 n.58 (1996).

37 Act of May 11, 1944, ch. 192, 58 Stat. 218.

38 *See* Act of June 25, 1948, ch. 646, §§ 294, 371, 372, 62 Stat. 869, 901, 903-04.

39 Act of Feb. 10, 1954, Pub. L. No. 294, § 4, 68 Stat. 8, 12-13.

40 *Id.*

41 Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, tit. II, § 204, 98 Stat. 333, 350 (codified as amended at 28 U.S.C. § 371 (2006)).

42 *See* 135 CONG. REC. 7570 (1989) (statement of Rep. Kastenmeier).

43 *See* Ethics Reform Act of 1989, Pub. L. No. 101-194, § 705, 103 Stat. 1716, 1770.

equal to 25% of those of a judge in regular active service; they could complete some combination of the two; or they could provide "substantial administrative duties" for the courts or the state and federal governments "equal to the full-time work of an employee of the judicial branch."[44] Disabled judges were exempted from the service requirements upon written certification of their disability to the chief judge of their circuit and the Chief Justice.[45]

Since 1989, the four end-of-career options for federal judges have remained largely unmodified. Although not expressly provided under the statute, a judge may resign from the office without pension. Under the current provisions of 28 U.S.C. § 371, judges who retire from the office receive a pension in the form of an annuity that is equal to their salary at the time of retirement. Judges who assume senior status receive the "salary of the office," including COLAs and any subsequent pay increases,[46] although eligibility for pay increases requires that they satisfy the service requirement imposed by Congress in 1989.[47] The fourth option is to remain in regular active service.

Judges in senior status who are certified as eligible for salary increases are free from the restriction on approved teaching income imposed on judges in regular active service.[48] Retired judges, having relinquished the office of judge, are free from any prohibitions that apply to judges who still hold the office, including the prohibition against practicing law.[49] Finally, judges serving in senior status enjoy considerable discretion over their dockets but are statutorily excluded from some judicial activities such as, for circuit judges, en banc rehearings (when not a member of the original panel),[50] receiving complaints against judges of the court,[51] serving as chief judge,[52] and exercising some administrative powers.[53]

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[44] *Id.*

[45] *Id.* at 1770-71.

[46] 28 U.S.C. § 371(b)(1).

[47] *Id.*

[48] 5 U.S.C. app. § 502(b). For the relationship between the 1989 restrictions on outside income and COLAs, see *infra* text accompanying notes 130 & 138.

[49] *See* 28 U.S.C. § 454.

[50] 28 U.S.C. § 46(c).

[51] 28 U.S.C. § 351(c).

[52] This is true for both circuit judges, 28 U.S.C. § 45, and district judges, 28 U.S.C. § 136. The prohibitions against becoming chief judge also extend to judges in regular active service who are older than sixty-four. 28 U.S.C. §§ 45(a)(1)(A), 136(a)(1)(A).

[53] 28 U.S.C. § 296. In 2008, the law was amended to allow a district judge in senior status to exercise full administrative responsibilities provided the judge sits on the same court to which she was appointed *and* has performed the equivalent of six months' full-time work in the previous

II. RESIGNATION

In this part we build on Emily Van Tassel's excellent research for the National Commission on Judicial Discipline and Removal by updating the data and testing her conclusions for the period from 1970 through 2009.[54] Since the information presented in this part is derived from public sources, and not from questionnaire responses that are subject to confidentiality, we use individual names when appropriate.

Between 1970 and 2009, 80 federal judges resigned from office. The number of resignations fluctuated widely by decade: 20 judges resigned between 1970 and 1979, 27 between 1980 and 1989, 10 between 1990 and 1999, and 23 between 2000 and 2009. This represented 3.8%, 3.9%, 1.2%, and 2.8% of the average number of authorized Article III judgeships during those decades, respectively.[55]

A. *Why Judges Resigned in the Last Four Decades*

Figure 1 displays the reasons judges have offered for resignation from 1970 through 2009. In the last four decades, return to private practice,[56] appointment to other office, and inadequate salary were the most commonly stated motivations, although dissatisfaction of various kinds and for various reasons was also very prominent. There is overlap between some of the categories; for instance, most resignations motivated by "inadequate salary" led to a "return to private practice."[57] We have sorted each resignation into a single category by attempting to discern which motivation was foremost, based on information available in newspapers and other public sources.

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year. Court Security Improvement Act of 2007, Pub. L. No. 110-177, § 503, 121 Stat. 2534, 2542 (2008).

54 *See* Van Tassel, *Resignations and Removals*, *supra* note 6. Drawing on the data available from the Federal Judicial Center, *see Biographical Directory of Federal Judges*, FED. JUDICIAL CTR., http://www.fjc.gov/history/home.nsf/page/judges.html (last visited Oct. 11, 2012), we have sought to replicate Van Tassel's methodology as closely as possible. We have sorted the reasons for resignation into the same seventeen categories she used. Van Tassel, *Resignations and Removals*, *supra* note 6, at app. 420-30 tbl.2.

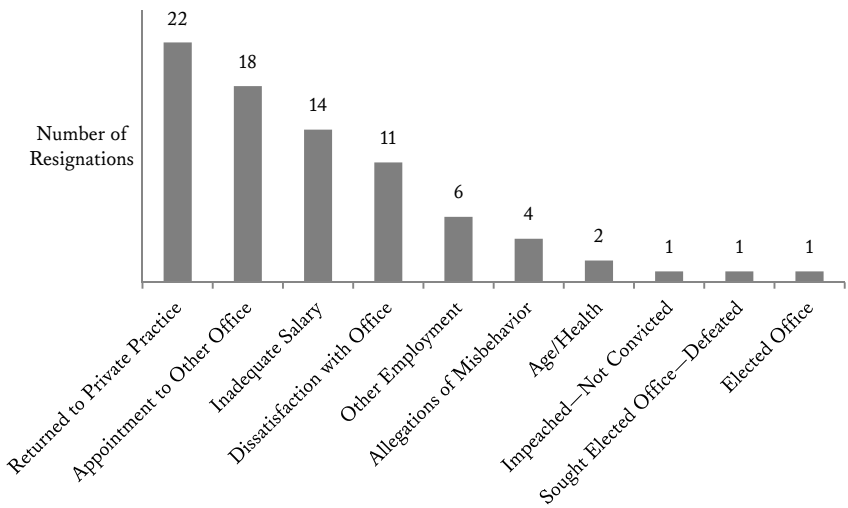
55 For the number of authorized Article III judgeships in these years, see *infra* text accompanying notes 113-15. *See also Authorized Judgeships—From 1789 to Present*, U.S. COURTS, http://www.uscourts.gov/uscourts/JudgesJudgeships/docs/allauth.pdf (last visited Oct. 11, 2012). Temporary judgeships, the Court of Appeals for the Federal Circuit, the District Court of Puerto Rico, and the Court of International Trade were excluded for the purposes of this calculation.

56 For the sake of consistency, we employ this term from Van Tassel when categorizing judges, but we use the more accurate term "enter private practice" when describing judges' actual behavior. *See* Van Tassel, *Resignations and Removals*, *supra* note 6, at 351.

57 *Id.* at 351 n.64.

The starkest contrast between recent trends and earlier patterns is the minimal role played by age and health, the largest category in Van Tassel's sweeping study.[58] Other comparisons are more difficult to draw because of the small sample size, but returning to private practice and appointment to another office appear to have been more prominent motivations for resignation in the last four decades than they were earlier.[59]

Figure 1: Reasons for Resignation, 1970–2009[60]



1. Age and Health

Age and health have played a minimal role in recent judicial resignations, probably because of the availability of disability provisions as well as declining rates of disability and ill health among seniors.[61] Between 1970 and 2009, only two judges resigned for health reasons, and only one resigned for those reasons in the past two decades.[62]

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[58] *See id.* at 351 fig.3 (reporting 101 resignations between 1789 and 1992 for "age/health," compared to only 2 between 1970 and 2009).

[59] *Compare id.*, *with infra* Figure 1.

[60] For more information on the sources and methodology employed, see *supra* note 54.

[61] *See* WAN HE ET AL., U.S. CENSUS BUREAU, 65+ IN THE UNITED STATES: 2005, at 60-63 (2005), *available at* http://www.census.gov/prod/2006pubs/p23-209.pdf.

[62] *See* Van Tassel, *Resignations and Removals*, *supra* note 6, at 421; Kenneth Ofgang, *District Judge Schiavelli to Step Down*, METROPOLITAN NEWS-ENTERPRISE (L.A., Calif.), Sept. 2, 2008, at 1 (describing the resignation of George P. Schiavelli following a knee injury).

2. Appointment to Other Office or Pursuit of Elected Office

Several judges were appointed to other public offices during the period in question.[63] In the 1980s, seven judges resigned to accept another appointment. In the last two decades, another seven judges resigned following appointment to other offices. Three district judges resigned after appointment to the California judiciary,[64] while four judges were appointed to federal positions as Director of the Drug Enforcement Administration,[65] Director of the FBI,[66] Secretary of Homeland Security,[67] and Deputy Attorney General.[68] In the case of the judges who resigned from the federal judiciary to join the California bench, salary may have played a role.[69] Finally, two judges resigned in the last four decades to pursue elective office.

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[63] *See* Van Tassel, *Resignations and Removals*, *supra* note 6, at 423.

[64] *See* Bob Egelko, *Governor Picks Latino for State's Highest Court—Son of East Los Angeles Produce Dealer Would Quit U.S. Judgeship to Replace Late Justice Mosk*, S.F. CHRON., Sept. 27, 2001, at A1 (describing the appointment of U.S. District Judge Carlos Moreno to the California Supreme Court); Josh Richman, *Judge in Wal-Mart Lawsuit Tapped for Court of Appeals*, TRI-VALLEY HERALD (Pleasanton, Cal.), Jan. 29, 2008 (U.S. District Judge Martin J. Jenkins); *Governor Schwarzenegger Appoints Nora Manella to Second District Court of Appeal*, CA.GOV (March 9, 2006), http://gov.ca.gov/news.php?id=373 (U.S. District Judge Nora Manella).

[65] Robert C. Bonner (C.D. Cal.) was appointed Director of the Drug Enforcement Administration (DEA) in 1990 by President George H.W. Bush. *See DEA Chief Optimistic*, SAN JOSE MERCURY NEWS (Cal.), Aug. 17, 1990, at 16A.

[66] Louis Freeh (S.D.N.Y.) was appointed Director of the FBI by President Bill Clinton, and served until the end of Clinton's presidency. Ann Devroy & Michael Isikoff, *Federal Judge Nominated as New FBI Head—Ex-Prosecutor, Agent, Would Succeed Sessions*, WASH. POST, July 21, 1993, at A1.

[67] Michael Chertoff (3d Cir.) was appointed Secretary of Homeland Security by President George W. Bush in 2005 and served until 2009. *See* Richard W. Stevenson & Eric Lichtblau, *Bush Names Judge as Homeland Security Secretary*, N.Y. TIMES, Jan. 12, 2005, at A1; Spencer S. Hsu, *Bush Homeland Security Officials to Stay on Till Weds*, WASH. POST (Jan. 19, 2009, 12:00 PM), http://voices.washingtonpost.com/44/2009/01/19/bush_homeland_security_officia.html?wprss=44.

[68] Mark R. Filip (N.D. Ill.) was appointed Deputy Attorney General by President George W. Bush in 2008 and served until 2009. *See* Dan Eggen, *Senate Confirms New No. 2 for Justice Dept.*, WASH. POST, Mar. 4, 2008, at A4; Spencer S. Hsu, *Many Bush Officials Held Over at DHS*, WASH. POST, Jan. 23, 2009, at A4.

[69] At the time they resigned, the three judges received pay increases by joining the California bench of roughly $17,000, $5,000, and $35,000 per year, respectively. *Compare* 37 SURVEY JUD. SALARIES (Nat'l Ctr. for State Courts), no. 1, 2012, *available at* http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/judicial&CISOPTR=337 (reporting state salaries), *with Judicial Salaries Since 1968*, U.S. COURTS, http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/JudgesJudgeships/docs/JudicialSalarieschart.pdf (last visited Oct. 11, 2012) (reporting federal salaries).

3. Dissatisfaction

As Van Tassel notes, virtually all resignations involve dissatisfaction in some sense.[70] Between 1970 and 2009, however, 11 judges specifically complained about their work as federal judges in explaining their decisions to resign. In the 1980s and early 1990s, a number of judges cited systemic causes of dissatisfaction. Judge Gabrielle McDonald noted the role of "overloaded dockets and lack of support services" in her decision to resign.[71] Judge J. Lawrence Irving expressed his anger over the Sentencing Guidelines and the constraints they placed on federal judges in explaining his resignation in 1990.[72] More recently, dissatisfied judges have cited more idiosyncratic causes of discontent. Timothy Lewis, who resigned in 1999, described the life of a judge as "a cloistered, sedentary, somewhat monastic setting."[73] Stephen Orlofsky, the only judge who cited dissatisfaction as a reason for resignation between 2000 and 2009, said that he was frustrated by the heavy load of criminal cases and that he was "just looking for new challenges."[74]

4. Return to Private Practice, Other Employment, Inadequate Salary

These factors motivated most resignations from 1970 through 2009. Fourteen judges entering private practice during this period specifically stated that they were resigning due to inadequate salary. For the other 28 judges taking nonpublic-sector employment, compensation was probably at least a factor: newspaper articles on their resignations often noted that their salaries doubled or tripled upon resignation.[75]

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70 *See* Van Tassel, *Resignations and Removals*, *supra* note 6, at 353 n.73.

71 *U.S. Judge Quits Post in Texas—She Was State's 1st Black Federal Jurist*, DALL. MORNING NEWS, Aug. 16, 1988, at 21A.

72 William Polk, *Judge Irving Resigns over Sentencing Rules*, SAN DIEGO EVENING TRIB., Sept. 27, 1990, at A-1.

73 Ann Belser, *Isolation of Court Drives Judge from the Bench: Timothy K. Lewis Joining Local Law Firm After 8 Years*, PITTSBURGH POST-GAZETTE, July 1, 1999, at B-4.

74 Kate Coscarelli, *District Judge Will Step Down—Respected Jersey Jurist Becomes 8th in the Court's History to Resign*, STAR-LEDGER (Newark, N.J.), Feb. 20, 2003, at 21.

75 *See, e.g.*, Belser, *supra* note 73, at B-4.

5. Allegations of Misconduct

Four judges resigned after allegations of misconduct. Otto Kerner and Herbert Fogel resigned in the 1970s.[76] In 1993, Robert Collins was convicted of bribery and imprisoned; he resigned after an impeachment resolution was introduced in Congress.[77] In 2008, Edward Nottingham resigned in the midst of a Tenth Circuit investigation into allegations that he had told a prostitute to lie about the nature of their relationship.[78]

In 2009, Judge Samuel Kent was convicted and imprisoned on charges stemming from sexual misconduct with two subordinates.[79] Although ineligible for a pension, he initially attempted to claim retirement on disability, which the Fifth Circuit denied.[80] After his impeachment, Judge Kent attempted to submit a resignation to take effect a year later; when Congress proceeded toward trial, he resigned effective June 30, 2009.[81]

B. *Analysis*

The most notable feature of the data is the variable rate of resignation by decade, especially the relatively low rate of resignation among federal judges in the 1990s. Although 27 judges resigned from 1980 to 1989 (3.9% of average authorized judgeships), and 23 judges resigned from 2000 to 2009 (2.8%), only 10 resigned from 1990 to 1999 (1.2%). This shift might be an aberration, but it might also reflect the impact of the judicial salary increase of 1991 and its effectiveness in promoting retention.[82] This possibility is supported by the smaller proportion of judges who resigned in the 1990s to return to private practice or take other employment, or who resigned due to

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[76] For background on these resignations, see Van Tassel, *Resignations and Removals*, *supra* note 6, at 385-86, 391-92.

[77] H.R. Res. 207, 103d Cong. (1993); H.R. Res. 176, 103d Cong. (1993); Joan McKinney, *Bill Clinton Receives Collins' Resignation*, ADVOCATE (Baton Rouge, La.), Aug. 7, 1993, at 1-B.

[78] Berny Morson, *Judge Nottingham Quits Amid Inquiry; He Faced Possible Impeachment in Misconduct Case*, ROCKY MTN. NEWS (Denver, Colo.), Oct. 22, 2008, at 5.

[79] Chris Paschenko, *From Behind Bars Kent Resigns From Bench*, GALVESTON COUNTY DAILY NEWS (Tex.), June 26, 2009.

[80] *See* Letter from Edith H. Jones, Chief Judge, U.S. Court of Appeals for the Fifth Circuit, to Samuel B. Kent, Judge, U.S. Dist. Court for the S. Dist. of Tex. (May 27, 2009), *available at* http://www.ca5.uscourts.gov/News/news/DeguerinResponseLetter.pdf (denying request to certify disability).

[81] *See* Paschenko, *supra* note 79.

[82] For a discussion of judicial salaries during the study period, see *infra* text accompanying notes 129-31.

inadequate salary, (4 of 10, 40%), than in the 1980s (16 of 27, 59.3%) or the 2000s (13 of 23, 56.5%).

Also striking is the apparent continued influence, noted by Van Tassel, of age at appointment on resignations. She suggested that judges who resign to assume other employment may be younger at appointment than the judiciary at large, although she lacked data on the average age of appointment for the judiciary as a whole.[83] Our data support this conclusion. As Figure 2 notes, judges who resigned to assume nonpublic-sector employment from 1970 through 2009 were appointed on average (by decade) at relatively young ages—between forty-one and forty-eight. These figures were considerably lower than the average age at appointment for all federal judges during the same period: 50.5 for circuit judges and 49.6 for district judges.[84] Of the 33 judges who resigned, 9 were appointed in their thirties, and 18 in their forties.

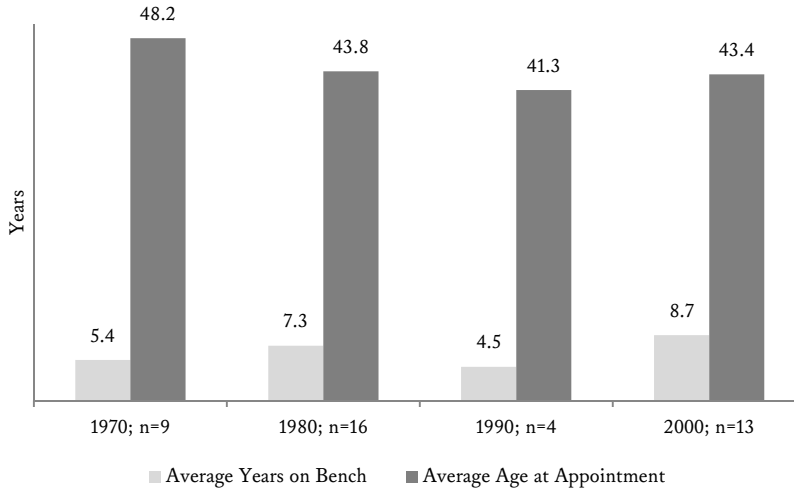
[83] Van Tassel, *Resignations and Removals*, *supra* note 6, at 357-58.

[84] Contrary to a common misperception, the average age of appointment for federal judges has remained relatively constant for the past four decades, as the following table of the average age of appointment demonstrates:

	District Judges	Circuit Judges
1970s	49.6	51.9
1980s	49.1	50.1
1990s	49.2	49.7
2000s	50.5	50.4
Average	49.6	50.5

Source: Administrative Office of the U.S. Courts (on file with authors).

Figure 2: Average Age at Appointment and Number of Years on Bench for Judges Resigning Under Categories of Inadequate Salary, Other Employment, or Return to Private Practice



Thus, the data support Van Tassel's hypothesis that judges appointed at younger ages are more likely to resign than other judges.

Although Van Tassel did not attempt to explain this phenomenon, one important factor may be the effect of pension eligibility on decisions to resign. From 1990 to 2009—after retirement from the office was made subject to the Rule of 80[85]—only eight judges above the age of fifty-five resigned, one of them for health reasons and two following allegations of misconduct. Over 74% of judges who resigned during the entire period of study served for less than ten years; 43% spent five or fewer years on the bench. As Judge Kent's effort to obtain disability certification suggests, judges consider their pension a valuable asset and are loath to abandon it.

Another of Van Tassel's conclusions—that, far from being unprecedentedly high, the rate of resignation among federal judges in recent decades is considerably lower than in the past—is borne out by these data. Van Tassel noted that the 1980s, when the resignation rate was 3.9% of the judiciary,[86]

[85] *See supra* text accompanying note 41.

[86] We calculate the resignation rate in the 1980s as 3.9%, slightly higher than Van Tassel's calculation. This difference results from the contrast between Van Tassel's calculation of the average authorized judgeships and ours. Van Tassel included all Article III courts, see *Resignations and Removals*, *supra* note 6, at 341 n.31, while we excluded the U.S. Court of Appeals for the Federal Circuit, territorial courts, and the Court of International Trade, see *supra* note 55.

was one of the four lowest decades since 1789.[87] In fact, in the last two decades the resignation rate has been still lower: in the 1990s it was only 1.2%, while in the 2000s it was slightly higher, at 2.8%. These rates are historically low, matched only by the very low rates in the 1950s and 1960s. If one looks only at resignations, the federal judiciary has enjoyed a golden age of retention over the past two decades. But, as we discuss in Part IV, resignation has not been the only way to leave the federal bench.

III. SERVICE IN SENIOR STATUS

A. *Introduction*

The brief history in Part I permits readers to situate service in senior status among the choices available to federal judges considering whether to leave regular active service. Congress created this alternative to full retirement for policy reasons having to do with both the federal judiciary as an institution and Article III judges as individuals. The historical account in Part I also permits readers to track the key subsequent developments in retirement from regular active service, many of which are most fruitfully considered by reference to contemporaneous arrangements for retirement from the office. Thus, Congress added to the incentives favoring senior status in 1948 legislation that made judges serving in that status eligible to receive the salary of the office, including salary increases, while continuing to fix the annuities of fully retired judges at the level of their salaries at the time of leaving office.[88] It did so again in 1954 by making judges eligible to assume senior status at or after age sixty-five with fifteen years of service or at or after age seventy with ten years of service, while continuing the latter as the exclusive age and service minimums for full retirement.[89]

The 1984 legislation introducing the Rule of 80 moved in the opposite direction, assimilating service in senior status and full retirement for purposes of eligibility requirements, and thereby eliminating one advantage of senior status.[90] The Ethics Reform Act of 1989 reduced another advantage

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87 Van Tassel, *Resignations and Removals*, *supra* note 6, at 349.

88 *See* Act of June 25, 1948, ch. 646, § 371, 62 Stat. 869, 903.

89 *See supra* notes 39-40 and accompanying text.

90 *See* Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 204, 98 Stat. 333, 350 (codified as amended at 28 U.S.C. § 371(c) (2006)). The Senate Judiciary Committee stated that the change was designed to eliminate "one unintended negative effect" of the existing disparity, namely that "individual judges who have elected [service in senior status] may have done so, not because they genuinely wished to continue rendering service, but because they did not wish to wait until age 70 to retire." S. REP. NO. 98-55, at 27 (1983). The Committee

by conditioning salary increases (as opposed to COLAs; fully retired judges receive neither) for judges in senior status on annual certification that they have performed a prescribed minimum amount of work.[91] Thereafter Congress avoided adding to the advantages of full retirement over service in senior status, and instead provided another advantage to senior status over regular active service, by exempting judges in senior status who are certified for salary increases from the 15% annual limit on outside income earned through approved teaching.[92]

One of the post-1919 developments that may have escaped attention by those reading our general historical account concerns the need for judges in senior status to be designated and assigned in order to perform judicial service. Prior to the 1944 legislation that clarified this requirement,[93] it was reported that "some retired judges ha[d] walked into courtrooms and announced that they were ready to function, when there was no need for their services."[94] The House Judiciary Committee's report stated that "[i]n the interest of orderly administration of justice with regard to the work of the courts it is advisable that the activity of the [judges in senior status] be fitted into the schedules of the active judges."[95]

Looking forward, if we are to understand why federal judges choose (or choose to remain in) senior status over continued regular active service or full retirement, we must take into account the aspects of their work that may influence choice. Judges who, because of disability, formally assume senior status or retire from office are not properly part of that inquiry: in the four decades since 1970, it appears that approximately 53 federal judges retired from regular active service, voluntarily or involuntarily, due to

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also stated its belief, however, that the change would not "significantly affect the numbers of judges choosing full retirement as opposed to retirement on senior status," noting "the incentive of continued salary increases if a judge chooses to retire on senior status and continues to perform judicial services." *Id*. At the time, there was no minimum work requirement governing eligibility for salary increases.

91 *See* Ethics Reform Act of 1989, Pub. L. No. 101-194, § 705, 103 Stat. 1716, 1770-71 (codified as amended at 28 U.S.C. § 371(e)). The requirements for salary increases are discussed above. *See supra* text accompanying notes 43-45.

92 *See* Judicial Improvement Act of 1990, Pub. L. No. 101-650, § 319, 104 Stat. 5089, 5117 (codified as amended at 5 U.S.C. app. § 502(b)).

93 *See* Act of May 11, 1944, ch. 192, §§ 1–3, 58 Stat. 218, 218-19 (current version at 28 U.S.C. § 294).

94 90 CONG. REC. 3871 (1944) (statement of Rep. Walter).

95 H.R. REP. NO. 78-934, at 2 (1943).

permanent disability.[96] They are not included in the analyses and discussion that follow.

B. *Some Demographic Characteristics of Judges in Senior Status, 1970–2009*[97]

There were 89 federal judges serving in senior status on January 1, 1970. From that time until December 31, 2009, 2143 judges served on the lower federal courts. During the same period, 1006 federal judges served in senior status for some period of time, a number that includes those in senior status at the start and end of the period. For the period as a whole, we calculated the age at which judges assumed senior status. Table 1 and Figure 3 present the data.

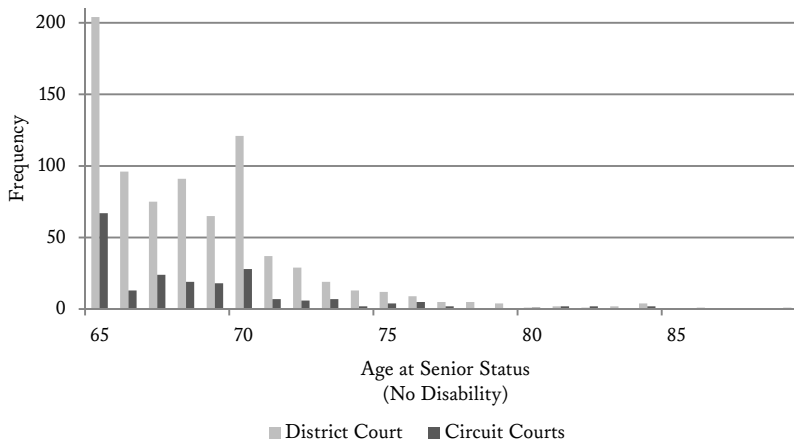
Table 1: Age at Assuming Senior Status

	All Judges	District Judges	Circuit Judges
Minimum	65	65	65
Maximum	89	89	84
Average	68	68	68
Median	68	68	68

[96] We have relied primarily on a list prepared in July 2009 by the Federal Judicial Center's Federal Judicial History Office, but we have supplemented it with a few additional involuntary retirements from a list furnished by the Administrative Office of the United States Courts (which is otherwise incomplete). Both lists are on file with the authors.

[97] We are indebted to Dr. Margaret Williams, Senior Research Associate in the Research Division of the Federal Judicial Center (FJC) for working with us to define the most pertinent data to extract from the FJC's database and the most useful analyses of those data, and for performing the analyses. Any views inferable from those analyses are her own and not necessarily those of the FJC. Note that the database does not include circuit judges who sit on the United States Court of Appeals for the Federal Circuit, judges on the Court of International Trade, or district judges who sit on territorial courts.

Figure 3: Histogram of Age at Assuming Senior Status[98]



When we look at the number of years federal judges who did assume senior status were eligible before doing so, the averages and medians (rounded to the nearest whole numbers) are similar, and Table 2 shows that most judges who have assumed senior status have not waited long to do so.

Table 2: Years Serving in Regular Active Service After Senior Eligible

	All Judges	District Judges	Circuit Judges
Minimum	0	0	0
Maximum	21	21	19
Average	2	1	2
Median	0	0	1

C. *The Contemporary Functions of Service in Senior Status*

A great deal has changed since 1919 in the nature and amount of work (judicial and administrative) performed by the federal judiciary, the

[98] Note that these data include judges who assumed senior status in years (1970–1984) when the eligibility rules required the judge to be either at least sixty-five years of age and to have served for at least fifteen years, or to be at least seventy years of age and to have served for at least ten years. *See supra* text accompanying notes 39-40.

number of Article III judges (and others) who do that work, and the contributions to the enterprise of judges serving in senior status.

1. The Workload of the Federal Judiciary, 1970–2009

In the four decades since 1970, the number of civil and criminal dispositions by the federal district courts has increased enormously.[99] The increase has been even more dramatic in the work of the regional courts of appeals.[100] Case terminations by themselves are not, however, a good basis for assessing workload, whether of a court or of an individual judge. One reason is that they do not reflect the resources available to process and consider the cases. As we shall see, at least since 1990, the growth in case terminations cannot plausibly be attributed to growth in authorized Article III judgeships. Yet, as Richard Posner's discussion of judicial surrogates in the mid-1980s suggests,[101] we are a long way from the days when a Justice of the Supreme Court could say with a straight face, "The reason the public thinks so much of the Justices of the Supreme Court is that they are almost the only people in Washington who do their own work."[102]

Federal judges today have available help that is different in degree and in kind from that available when Congress first provided for service in senior status—or for that matter in 1970—including more law clerks, magistrate judges, special masters, and staff attorneys. For that reason, when considering requests for additional judgeships, informed members of Congress do not take at face value data reflecting adjusted case filings (for the courts of appeals) or weighted average caseloads (for the district courts) that omit the contributions of judges in senior status (and, for district

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[99] Civil case terminations increased 328% from 1970 to 2009: 80,435 civil cases were terminated in 1970, 143,323 in 1979, 235,219 in 1989, 272,526 in 1999, and 263,703 in 2009. The data are available in the *Judicial Business of the United States Courts* reports for 1970, 1979, 1989, 1999, and 2009. *See* ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS tbl.C-1 (1970, 1979, 1989, 1999, & 2009) (civil). Criminal case terminations increased 204%: 36,819 criminal cases terminated in 1970, 33,442 in 1979, 42,810 in 1989, 56,511 in 1999, and 75,077 in 2009. *See id.* tbl.D-1 (criminal).

[100] Appellate terminations increased 565% from 1970 to 2009. In 1970, the regional courts of appeals terminated 10,699 cases, in 1979, 18,928 cases, in 1989, 37,372 cases, in 1999, 54,088 cases, and in 2009, 60,508 cases. *See id.* tbl.B-1 (appellate).

[101] *See* RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 97-119 (1985); *id*. at 103 ("[A] relationship between caseload growth and law-clerk growth seems plain.").

[102] The quotation is attributed to Justice Brandeis. DAVID M. O'BRIEN, STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS 122 (9th ed. 2011) (citing CHARLES E. WYZANSKI, WHEREAS—A JUDGE'S PREMISES 61 (1944)).

courts, of magistrate judges).[103] When seeking additional judgeships, the Judicial Conference also takes into account, among other factors, the number of senior judges, their ages and levels of activity, magistrate judge assistance, and the use of visiting judges.[104]

Another reason why case terminations are not a sufficient basis for assessing workload—this is not intended to be an exhaustive list—is that different modes of termination may involve different levels of judicial effort. Even the same mode of termination may involve different levels of judicial effort over time. As to the former point, recent scholarship has documented the near death of trials as a mode of terminating federal civil cases in the last fifty years,[105] as it has documented the growth of terminations by summary judgment.[106] Consider also the phenomenon of procedural, as opposed to merits, terminations by the courts of appeals, which have increased substantially in recent years.[107] As to changes in the same mode of termination over time, more than twenty years ago Judge Jon Newman observed of courts of appeals that "more and more cases are being decided without oral argument and without published opinions."[108]

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[103] *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO/GGD-99-37R, FEDERAL JUDICIARY: INFORMATION ON THE WEIGHTED FILINGS ASSIGNED TO SENIOR DISTRICT AND MAGISTRATE JUDGES IN FISCAL YEAR 1997 IN 21 DISTRICT COURTS (1999) [hereinafter GAO 1999 Letter]; U.S. GOV'T ACCOUNTABILITY OFFICE, GAO/GGD-99-17R, FEDERAL JUDICIARY: INFORMATION ON CASES ASSIGNED TO SENIOR JUDGES IN FISCAL YEAR 1997 IN FOUR CIRCUIT COURTS OF APPEALS (1998) [hereinafter GAO 1998 Letter].

[104] *Responding to the Growing Need for Federal Judgeships—The Federal Judgeships Act of 2009: Hearing Before the Subcomm. on Admin. Oversight and the Courts of the S. Comm. on the Judiciary*, 111th Cong. 8-9 (2009) (statement of J. George Z. Singal, Chair of the Judicial Conference Comm. on Judicial Resources); *id.* at 15 (statement of J. Singal); *id.* at 2 (opening statement of Sen. Whitehouse).

[105] *See* Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 460-65 (2004).

[106] *See* Stephen B. Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?*, 1 J. EMPIRICAL LEGAL STUD. 591, 617-18 (2004). Increased resolution of cases by summary judgment may not signal a more efficient use of judges' time. "Judges will tell you consistently that they would much rather be in court presiding over a trial than they would doing summary judgment motions, which takes hours and hours and hours." *Responding to the Growing Need for Federal Judgeships*, *supra* note 104, at 17 (statement of J. Singal).

[107] "While there were nearly 7000 more cases terminated on the merits than procedural terminations in 1992, this difference was only 2131 in the 2009 term, with 30,160 merits terminations and 28,029 procedural terminations." Todd Collins, *Re-Opened for Business? Caseloads, Judicial Vacancies, and Backlog in the Federal Circuit Courts*, 95 JUDICATURE 20, 24 (2011).

[108] Jon O. Newman, *Restructuring Federal Jurisdiction: Proposals to Preserve the Federal Judicial System*, 56 U. CHI. L. REV. 761, 766 (1989). Judge Posner discussed the same phenomena in 1985. POSNER, *supra* note 101, at 119-29; *see also* Hart v. Massanari, 266 F.3d 1155, 1177 (9th Cir. 2001) ("While federal courts of appeals generally lack discretionary review authority, they use their authority to decide cases by unpublished—and nonprecedential—dispositions to achieve the same

For present purposes we need not enter further into debates about the case workload of the federal courts. It suffices that, quite consistently since 1970,[109] both the federal district courts and the regional courts of appeals have been required to become involved in an increasing number of cases. It remains to be seen what role(s) judges serving in senior status have played in the disposition of those cases, a subject to which we will turn shortly.

Finally, the workload of federal judges, as opposed to that of federal courts, is not restricted to the cases or controversies contemplated in Article III. The source of Judge Posner's anxiety about judicial surrogates in 1985 was that the federal courts had come to resemble a bureaucracy in the performance of judicial work.[110] The phenomenon has hardly been confined to that domain. Management and governance at all levels increasingly have relied on committees of judges. For example, in 1970, the Judicial Conference of the United States had 16 committees.[111] In 2009, it had 25 committees.[112] Some of the increase at all levels has been necessary to respond to tasks imposed by federal statutes. Some of it is due not to additional statutory responsibilities but to other complexities of the times. In addition, the perceived need to protect the interests of the judiciary as a branch of government has led both to the creation of new committees and to an increasing role for judges on existing committees.

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end . . . ."). For current practices, see Marin K. Levy, *The Mechanics of Federal Appeals: Uniformity and Case Management in the Circuit Courts*, 61 DUKE L.J. 315, 325-65 (2011) (describing, comparing, and analyzing the normative implications of case management practices in five courts of appeals).

[109] Note, however, that circuit court civil filings peaked in 2005, declining approximately 16% from 2005 to 2009. *See* Collins, *supra* note 107, at 22. For a discussion of the possible reasons for that decline, see *id.* at 22-23.

[110] *See* POSNER, *supra* note 101, at 115 ("I mean 'bureaucracy' in its popular sense of a large, unwieldy organization tenuously held together by paper."); *see also* Owen M. Fiss, *The Bureaucratization of the Judiciary*, 92 YALE L.J. 1442, 1456 (1983) ("The proliferation of staff and subjudges and the delegation of power to them weaken the judge's individual sense of responsibility."); Newman, *supra* note 108, at 766-67 (noting the federal courts' increased reliance on magistrate judges and law clerks).

[111] *See* ADMIN. OFFICE OF THE U.S. COURTS, REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES v-vi (1970), *available at* http://www.uscourts.gov/FederalCourts/JudicialConference/Proceedings/Proceedings.aspx?doc=/uscourts/FederalCourts/judconf/proceedings/1970-10.pdf.

[112] *See* ADMIN. OFFICE OF THE U.S. COURTS, REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 4-36 (2009), *available at* http://www.uscourts.gov/FederalCourts/JudicialConference/Proceedings/Proceedings.aspx?doc=/uscourts/FederalCourts/judconf/proceedings/2009-09.pdf.

2. Authorized Judgeships and Vacancies, 1970–2009[113]

Over the period covered in this study, the number of judgeships authorized for the regional courts of appeals has increased from 97 to 167, with the creation of the United States Court of Appeals for the Federal Circuit adding 12 circuit judgeships in 1982 (a number that has not changed). Over the same period, the number of judgeships authorized for the district courts has increased from 510 (plus 1 temporary judgeship)[114] to 667 (plus 10 temporary judgeships). Substantial increases during this period occurred in 1978, 1984, and 1990.

The number of authorized judgeships for the courts of appeals has not increased since 1990. The number of authorized judgeships for the district courts has increased by 35 (with the number of authorized temporary judgeships remaining the same). Comparison of authorized judgeship increases with increases in case terminations from 1990 to 2009 led us to observe that "at least since 1990 the growth in case terminations cannot plausibly be attributed to growth in authorized Article III judgeships."[115]

Beyond that, vacancies in authorized judgeships, aggravated by delays in the appointment process, require federal judges to share the same amount of work among fewer people. As an example, a GAO study found that vacancies on the Second Circuit increased adjusted case filings in Fiscal Year 1997 from 750 per three-judge panel to 1083 (before accounting for the contribution of judges in senior status).[116] Recent work analyzing vacancies on the courts of appeals in the period from 1992 to 2009 shows that the number of vacancy months per year has varied substantially. For example, in 2002 "nearly 18 percent" or "one in five active [circuit] judgeships were unfilled," while the percentage of vacancies decreased "to just below 9 percent" in 2009.[117]

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113 The information presented on authorized judgeships is available at U.S. COURTS, http://www.uscourts.gov/JudgesAndJudgeships/AuthorizedJudgeships.aspx (last visited Oct. 11, 2012).

114 As the name implies, temporary judgeships do not permanently increase the number of authorized judgeships.

115 *Supra* text accompanying note 101.

116 *See* GAO 1998 Letter, *supra* note 103, at 5 tbls.2&3.

117 Collins, *supra* note 107, at 26. For an analysis linking the vacancy rate to the percentage of cases carried over from one term to the next, see *id.* at 27-28.

3. The Ratio of Service in Senior Status to Regular Active Service

To assess the role that judges serving in senior status have played in the work of the federal judiciary, we determined the ratio of the length of their service to that of judges in regular active service during the four decades covered in our study.[118]

Rather than relying only on the numbers of judges in regular active service and senior status on given dates, we counted the days judges spent in regular active service and in senior status during each decade and calculated the relative percentages. We thus took vacancies into account. Tables 3 and 4 present the percentage of days of service by judges in regular active service and judges in senior status during each decade in our study period, displayed separately for the circuit courts and the district courts.

Table 3: Days of Service by Decade—Circuit Courts

	Judges in Regular Active Service	Judges in Senior Status
1970s	67.3%	32.7%
1980s	72.3%	27.7%
1990s	68.5%	31.5%
2000s	60.8%	39.2%

Table 4: Days of Service by Decade—District Courts

	Judges in Regular Active Service	Judges in Senior Status
1970s	79.3%	20.7%
1980s	77.8%	22.2%
1990s	65.5%	34.5%
2000s	63.4%	36.6%

The most noteworthy aspects of the data in these tables are the steep increases in the ratio of service in senior status to regular active service

[118] We are again indebted to Dr. Margaret Williams, Senior Research Associate in the FJC's Research Division, for her invaluable assistance in computing the days in service by decade from which these ratios were derived. Any views inferable from her computations are her own and not necessarily those of the FJC. The underlying computations are on file with the authors.

between the 1980s and the 2000s. Again, there have been no new authorized circuit judgeships since 1990. The increase from the 1980s to the 2000s is even greater for the district courts (14.4% vs. 11.5% for circuit courts), but most of that increase occurred during the 1990s. We think that new authorized judgeships contributed to this increase, since all 35 district judgeships added after 1990 were authorized in 1999, 2000, and 2003, lowering the increase in the ratio of senior service in the 2000s.

4. Case Work Performed by Judges Serving in Senior Status

Data from the Administrative Office of the United States Courts (AO) permit us to determine the percentage of the work for which judges serving in senior status have been responsible in the last two decades of our study period. For the regional courts of appeals, the data report participations in cases in which oral hearings were held and cases submitted on the briefs. Table 5 presents the participation percentages attributable to judges in senior status.

Table 5: Percentage of Participations by Judges in Senior Status in Oral Hearings and Submissions on Briefs in the Regional Courts of Appeals, 1990–2009

1990	14.2	**1995**	13.8	**2000**	16.4	**2005**	18.0
1991	14.9	**1996**	13.9	**2001**	15.9	**2006**	17.1
1992	14.0	**1997**	14.7	**2002**	15.8	**2007**	18.8
1993	12.8	**1998**	15.9	**2003**	16.9	**2008**	18.2
1994	12.3	**1999**	15.1	**2004**	17.2	**2009**	17.8

The data for the district courts separately report all civil and criminal case terminations, all trials conducted, all hours in trial, and all hours in other proceedings. We present in Table 6 only the percentages for case terminations, and comment as appropriate on the other data.

Table 6: Percentage of Civil and Criminal Case Terminations by District Judges in Senior Status, 1990-2009

1990	12.0	**1995**	14.9	**2000**	18.1	**2005**	16.5
1991	12.2	**1996**	14.5	**2001**	17.7	**2006**	17.0
1992	14.5	**1997**	16.8	**2002**	17.9	**2007**	18.2
1993	15.2	**1998**	17.1	**2003**	17.8	**2008**	22.3
1994	15.5	**1999**	17.2	**2004**	17.3	**2009**	21.2

The composite averages in the courts of appeals are 14.2% for the 1990s and 17.2% for the 2000s. In the district courts the composite averages are 15.0% for the 1990s and 18.4% for the 2000s. Comparing these composite averages by decade with the percentage of service by judges in senior status during those decades suggests that, when compared to the case workload of judges in regular active service, on average district court judges serving in senior status were carrying a 43.5% case workload in the 1990s and a 50.3% case workload in the 2000s. The same comparison suggests that on average circuit judges in senior status on the regional courts of appeals were carrying a 43.9% case workload in the 1990s and a 45.1% case workload in the 2000s.

Indeed, it is probable that these imputed case workloads are understated. As of September 30, 2009, 16 of 93 circuit judges in senior status (17.2%) and 68 of 347 of district judges in senior status (19.6%) did not have chambers and staff.[119] On the assumptions that the 2009 data are representative of the decade and that judges without chambers and staff did no (or negligible) work, this suggests that, when compared to the case workload of judges in regular active service, the average workload in the 2000s among district judges in senior status with chambers and staff was about 62.5%. The comparable workload for circuit judges with chambers and staff was about 53%.

On average, district judges in senior status conducted 18.1% of all trials during the 1990s; during the 2000s they conducted 19.9% of all trials.[120]

[119] E-mail from Carol Sefren, Chief, Judges' Compensation and Ret. Servs. Office, Admin. Office of the U.S. Courts, to Stephen Burbank (Dec. 12, 2011) (on file with authors).

[120] Admin. Office of the U.S. Courts, Work of Senior Judges (on file with authors). Note that the Administrative Office defines "trial" very broadly to include "hearings on temporary restraining orders and preliminary injunctions, hearings on contested motions, miscellaneous civil cases, and other contested proceedings in which evidence is introduced." ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS (2009), at 180 tbl.C-7 note.

Moreover, in the last two years of the last decade, they conducted 25.1% and 26.0% of all trials.[121] In addition, data compiled for the same three-year periods in the 1990s and 2000s show that, with few exceptions, judges in senior status provided more than 50% (and often more than 60%) of the total district court case work of visiting judges in all three categories for which data are collected: civil workload, criminal workload, and trials completed.[122] Finally, of the 217 transferee judges overseeing 293 Multidistrict Litigation (MDL) dockets as of September 5, 2012, 54 (24.9%) were district judges in senior status.[123]

5. Administrative Work Performed by Judges Serving in Senior Status

Just as the caseload of federal judges increased substantially over the forty years covered in our study, so have the tasks unrelated to deciding specific cases that federal judges perform. Unfortunately, however, we do not have data on the administrative work of judges in senior status that are comparable in breadth or depth to the caseload data presented above. We do know that, as of March 2010, a total of 275 federal judges were members of committees of the Judicial Conference of the United States, of whom 35 (12%) were judges in senior status.[124] Moreover, we received specific information about membership in circuit-wide committees from the nine circuits that responded to our questions. On average, judges in senior status constituted 19.1% of the committee members, from a high of 26.7% in one circuit to a low of 3.2% in another.

Legislation enacted in 2008 provides that district judges in senior status who have performed half the workload of their counterparts in regular active service in the previous year "shall have the powers of a judge of that court to participate in appointment of court officers and magistrate judges,

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121 Admin Office of the U.S. Courts, *supra* note 120.

122 *Id.*

123 *MDL Statistics Report—Distribution of Pending MDL Dockets*, U.S. JUDICIAL PANEL ON MULTIDISTRICT LITIG., http://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets-By-District-September-2012.pdf (last visited Oct. 11, 2012).

124 As for the Judicial Conference itself, because circuit judges in senior status are not eligible to serve as chief judge, they similarly are not eligible to serve on the Conference. There is no such bar to service by district judges in senior status. One district judge in each circuit is elected to serve on the Judicial Conference by majority vote of all circuit and district judges in that circuit. *See* 28 U.S.C. § 331 (2006). During the 2000–2009 decade, seven district judges in senior status served on the Judicial Conference, two of whom served for more than one term. To access the *Reports of the Proceedings of the Judicial Conference of the United States* from 2000 through 2009, see http://www.uscourts.gov/FederalCourts/JudicialConference/Proceedings.aspx (last visited Oct 11, 2012).

rulemaking, governance, and administrative matters."[125] The same legislation appears to give the power to participate in the appointment of magistrate judges to any district judge in senior status who is designated and assigned,[126] an inconsistency that has prompted the Judicial Conference to call for repeal of the latter provision.[127] As to how many judges qualify for full administrative participation, we estimated above that in 2009, on average nationwide, district judges in senior status performed more than the casework required by the 2008 legislation, which is double that required to be eligible for salary increases.

Most of the powers to which the 2008 legislation relates do not portend a reduction in administrative work performed by judges in regular active service.[128] For our purposes they are, therefore, more pertinent to the working conditions of, and incentives affecting, district judges in or contemplating senior status, which we take up next.

D. *The Contemporary Working Conditions of Judges in Senior Status*

1. Salary, Benefits, and Collateral Financial Consequences

As we observed in the introduction to this part, differential compensation for judges in senior status and retired judges had the effect, intended or not, of adjusting the incentives potentially affecting choices by federal judges, much like the use of different age and service requirements. From 1970 through 1991, the salary of a federal district judge rose from $40,000 to $125,100, while that of a federal circuit judge increased from $42,500 to $132,700.[129] The differential treatment of judges in senior status and fully

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125 Court Security Improvement Act of 2007, Pub. L. No. 110-177, § 503, 121 Stat. 2534, 2542 (2008) (to be codified at 28 U.S.C. § 296).

126 *See id.* § 504 (to be codified at 28 U.S.C. § 631(a)).

127 *See* ADMIN. OFFICE OF THE U.S. COURTS, REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 5-6, 11-12 (2008), *available at* http://www.uscourts.gov/FederalCourts/JudicialConference/Proceedings/Proceedings.aspx?doc=/uscourts/FederalCourts/judconf/proceedings/2008-09.pdf.

128 The same is not true of service on circuit judicial councils, the members of which, although chosen by a majority vote of judges in regular active service, can include judges in senior status. *See* 28 U.S.C. § 332(a)(3).

129 *Pay Charts and Tables*, U.S. COURTS, http://www.uscourts.gov/JudgesandJudgeships/JudicialCompensation/PayChartsTables.aspx (last visited Oct. 11, 2012).

Note that there were substantial Quadrennial Commission increases effective March 1, 1969, as a result of which 1969 was the year of the "highest real salaries for federal judges since at least 1913." DENIS STEVEN RUTKUS, CONG. RESEARCH SERV., RL34281, JUDICIAL SALARY:

retired judges would have meant, for example, that for two similarly situated district judges (one who assumed senior status and the other who retired from the office in 1978) by 1988 the judge in senior status would have been paid $89,500, while the fully retired judge would have been paid $54,500 (61% of the salary of a judge in senior status). By 1991 (including the salary increase in that year, assuming the judge in senior status had been certified for salary increases), the gap would have grown to $125,100 vs. $54,500 (43.6% of the salary of a judge in senior status).

There have been no salary increases for federal judges, whatever their status, since 1991. In addition, from 1992 through 2009, Congress declined to adjust the salaries of federal judges five times when the general federal workforce (General Schedule Employees) received COLAs, even though it was widely understood in both Congress and the judiciary that automatic COLAs were the quid pro quo for the restrictions on outside income introduced by the Ethics Reform Act of 1989.[130]

As a result, the Administrative Office reports that, although the pay of most federal workers increased 91% and inflation increased 53% during this period, federal judges' salaries increased only 39%.[131] If our two hypothetical district judges had left regular active service in 1999 instead of 1978, by 2009 the judge who had assumed senior status would have been paid $174,000 and the judge who had fully retired $136,700 (78.6% of the salary of a judge in senior status).

Congress's failure to provide a salary increase to federal judges for twenty years and its recurrent failure to provide COLAs thus reduced the gap between the compensation of judges in senior status and the annuities of fully retired judges, making retirement more attractive. To the extent that financial considerations drive choices for judges not able or not inclined to

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CURRENT ISSUES AND OPTIONS FOR CONGRESS 3 (2008), *available at* http://www.fas.org/sgp/crs/misc/RL34281.pdf.

130 *Federal Judicial Pay Increase Fact Sheet*, U.S. COURTS, http://www.uscourts.gov/JudgesAndJudgeships/JudicialCompensation/JudicialPayIncreaseFact.aspx (last visited Oct. 11, 2012). For the understanding of the 1989 legislation, see 135 CONG. REC. 29,686 (1989) (statement of Sen. Mitchell) ("a series of measures that are interrelated"); *infra* text accompanying note 186. For the restrictions on outside income, see *infra* text accompanying note 137. Federal judges also did not receive a COLA in 1994, when General Schedule employees received an increase that was allocated entirely to locality pay adjustments. Telephone Interview with Richard Jaffe, Chief, Judicial Impact Office, Admin. Office of the U.S. Courts (Aug. 10, 2012). After our study period, Congress again failed to provide COLAs for federal judges in 2010 and for both judges and General Schedule employees in 2011 and 2012. For litigation arising out of Congress's failure to provide COLAs to judges, see *infra* note 204.

131 U.S. COURTS, *supra* note 130. For a table providing nominal and real salaries for federal judges and average wage earners from 1955 to 2006, see RUTKUS, *supra* note 129, at 42-44 app. 2.

profit from full retirement, the choice today presumably is between assuming senior status and remaining in regular active service.

Federal judges did not become part of the social security system, and hence subject to FICA (social security and Medicare) taxes, until 1984.[132] The law initially distinguished between judges in senior status who continued to perform some judicial services and those who performed none, and applied the taxes only to the former. Once in effect—which it was for only a few months in 1986—the distinction quickly revealed powerful evidence of the sensitivity of judges' choices to collateral financial considerations, as more than a third of judges then serving in senior status stopped accepting case assignments. Chief Justice Burger decried the distinction as a "drastic disincentive," observing that the "experience and wisdom our senior judges provide is of even greater value than their substantial quantitative contribution," and that "[i]f we lose their services, we lose a priceless asset."[133] Congress responded in legislation that "permanently exempted senior judges performing judicial duties from social security coverage and applied retroactively to judicial services performed after December 31, 1983."[134]

Today the most important financial difference between service in senior status and regular active service would seem to be precisely that judges in senior status are not subject to FICA taxes on their judicial compensation. In addition, some state and local taxing authorities treat senior status as retirement for purposes of exemption from or reduction of income, wage, and similar taxes.[135]

The salience of freedom from FICA taxes for the choices that federal judges make can only have grown as the purchasing power of federal judicial pay has shrunk. In addition, in focus group interviews[136] we heard estimates that the federal, state, and local tax advantages for judges in senior status who live or work where taxing authorities treat their compensation as

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132 *See* 26 U.S.C. § 3121(b)(5)(E). For an overview of the history of this change, see Robinson v. Sullivan, 905 F.2d 1199, 1200 (8th Cir. 1990).

133 Ronald J. Ostrow, *End Tax on Senior Judges, Burger Urges*, L.A. TIMES, Jan. 22, 1986, at 17.

134 *Robinson*, 905 F.2d at 1201 (describing the effect of the Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, § 12112(b), 100 Stat. 288 (1986)).

135 "While it is still subject to federal income taxation, New York State (along with several other states) and New York City exempt senior-status compensation from state and city income taxes." Frederic Block, *Senior Status: An "Active" Senior Judge Corrects Some Common Misunderstandings*, 92 CORNELL L. REV. 533, 539 (2006).

136 We use the term to include any interview, whether of a group or an individual, animated in part by the aim of refining the questions to be posed in our questionnaires and alerting us to questions not amenable to survey research.

retirement income total between $25,000 and $30,000—a nontrivial percentage of their total compensation.

As judicial pay has lagged behind inflation, the importance of other income should also have grown. Federal judges are forbidden to practice law,[137] and, following the Ethics Reform Act of 1989, they have been strictly constrained in their ability to receive outside income, such as honoraria for lectures. Book royalties are not covered by those limitations,[138] but the exception presumably does not benefit very many federal judges. What might make a difference for a larger group of judges is the opportunity to earn up to 15% of a specified salary in approved teaching income.[139] For judges in regular active service, the cap is now at $26,955.[140] Judges in senior status who have met the workload certification requirement for salary increases are exempt from the 15% limit.[141]

Another financial advantage of service in senior status arises from the fact that the judge's official duty station is where the judge lives[142] and that reimbursement is generally available to cover the costs of travel and subsistence expenses "while attending court or transacting official business at a place other than his official duty station for any continuous period less than thirty calendar days."[143] Although the AO reported in 1999 that most judges in senior status did not claim such reimbursement,[144] focus group interviews suggested that it might be a choice-influencing consideration for some.

Finally, judges in senior status continue to be eligible to participate in almost all of the benefit programs that are offered to judges in regular active service, including life insurance, health insurance, and survivor annuity programs.[145] They are not eligible, however, to continue participating in the

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137 28 U.S.C. § 454.

138 2 GUIDE TO JUDICIARY POLICY § 1020.25 & 1020.30 (2010), *available at* http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/RulesAndPolicies/conduct/Vol02C-Ch10.pdf.

139 5 U.S.C. app. § 501(a)(1).

140 The level II salary for 2011 is $179,700. *Salary Table No. 2012-EX*, U.S. OFFICE OF PERS. MGMT., http://www.opm.gov/oca/12tables/html/ex.asp (last visited Oct. 11, 2012).

141 5 U.S.C. app. § 502(b)(2).

142 28 U.S.C. § 374.

143 28 U.S.C. § 456(a).

144 ADMIN. OFFICE OF THE U.S. COURTS, SENIOR STATUS AND RETIREMENT FOR ARTICLE III JUDGES 15 (1999).

145 *See id.* chs. 6-8. For more recently added benefits programs also available to judges in senior status, see the discussions of the *Federal Employees Dental and Vision Insurance Program* and *Long-Term Care Insurance* in *Article III Judges: Retirement Lifeline*, a publication for judges of the Judges Compensation and Retirement Services Office.

Thrift Savings Plan, which "offers the same type of savings and tax benefits many private corporations offer their employees through 401(k) plans."[146]

2. Other Terms and Conditions

Service in senior status entails both privileges and disabilities—advantages and disadvantages—as to the nonfinancial terms and conditions of the judge's working environment.

a. *Privileges (Advantages)*

The primary privilege of service in senior status is to reduce the amount of work that the judge performs. A circuit judge in senior status who is designated and assigned may choose to participate in fewer sittings, or otherwise carry a lighter workload, than a judge in regular active service. This privilege does not usually include selecting which cases or types of cases among those scheduled for a sitting that a judge in senior status will hear. In several circuits, however, circuit judges in senior status do not, or may choose not to, sit on capital case panels. Responses to our circuit executive questionnaire indicate that practices vary as to whether circuit judges in senior status are given precedence over judges in regular active service once both have provided the dates they prefer to sit.

For district court judges, focus group interviews and responses to our circuit executive questionnaire suggest that, although practices vary, most if not all district courts accord judges in senior status some freedom not just to reduce their workload, but to do so by selecting the cases in which they will participate. This may involve opting out of the criminal (or civil) wheel or specifying categories of cases they do not wish to hear (with the permitted number of categories also varying). Moreover, the freedom thus accorded may extend beyond case types to the type of work a judge in senior status will perform, for example, deciding motions rather than presiding at trials.

For district and circuit judges alike, the freedom to reduce workload might be attractive and influence the career choices they made, for a host of nonfinancial reasons, including the perception of flagging energy, health concerns, family concerns (e.g., a spouse or child who needed extra care), or the desire to spend more time with family or pursue other interests.

To the extent that this freedom entails the ability to be selective about cases—as we believe it does to some extent for most if not all district judges

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146 SENIOR STATUS AND RETIREMENT, *supra* note 144, at 24.

in senior status—the ability to specialize in, or conversely to avoid, a type of case may itself be an important choice-influencing consideration. Thus, for instance, before the Supreme Court put a measure of discretion back into criminal sentencing,[147] senior status provided a means for judges to avoid what some perceived as the agony of imposing unjust sentences required by the Sentencing Guidelines.[148]

For judges who valued the opportunity to spend time in other parts of the country—perhaps because they lived where the climate was seasonally harsh (and seemed harsher as they aged) or because they wished to spend more time with children or grandchildren living far away—the intercircuit assignment system might influence the choice to take senior status. The same might be true for judges who simply wanted to help colleagues on courts in other circuits whose dockets were more burdensome than their own.

Last among the nonfinancial privileges of service in senior status that we deem salient for this project is the opportunity to create a vacancy, thereby enabling the appointment of another judge to the court.[149] This privilege has dominated prior academic research on federal judges leaving regular active service, although the phenomenon usually has not been so framed. Because political scientists conducted most of the research in question, the frame has been strategic partisan retirement.[150] The value of some of this research is diminished by its failure to distinguish between retirement from

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147 *See* United States v. Booker, 543 U.S. 220, 222 (2005) (holding that the Sentencing Guidelines are "effectively advisory").

148 *See* Richard T. Boylan, *Do the Sentencing Guidelines Influence the Retirement Decisions of Federal Judges?*, 33 J. LEGAL STUD. 231, 232-34 (2004); *see also supra* text accompanying note 72.

149 Recall, however, that a vacancy may not be created when the judge assuming senior status serves on a court that has a temporary judgeship. *See supra* note 114. In particular, that which makes the judgeship temporary is precisely Congress's direction that, after a certain period of time, when a judge who holds the judgeship leaves regular active service, the vacancy cannot be filled. *See, e.g.*, *Temporary Bankruptcy Judgeship Bill Passes*, U.S. COURTS (May 31, 2012), http://news.uscourts.gov/temporary-bankruptcy-judgeship-bill-passes.

150 *Compare* James F. Spriggs & Paul J. Wahlbeck, *Calling It Quits: Strategic Retirement on the Federal Courts of Appeals, 1893–1991*, 48 POL. RES. Q. 573, 588-89 (1995) (finding evidence of strategic retirements), *with* Christopher J.W. Zorn & Steven R. Van Winkle, *A Competing Risks Model of Supreme Court Vacancies, 1789–1992*, 22 POL. BEHAV. 145, 157 (2000) (finding "little" evidence). *See also* Thomas G. Hansford et al., *Politics, Careerism, and the Voluntary Departures of U.S. District Court Judges*, 38 AM. POL. RES. 986, 998-99 (2010) (finding evidence of partisan motivation in the timing of departures by district court judges from regular active service, but only among pension-eligible judges). For a summary of empirical studies, see Terri Peretti & Alan Rozzi, *Modern Departures from the U.S. Supreme Court: Party, Pensions, or Power?*, 30 QUINNIPIAC L. REV. 131, 138-47 (2011).

regular active service and retirement from the office,[151] or failure to capture changes in age and service requirements or compensation.[152] Such details may require attention to discrete periods, preventing or making more difficult the kind of data aggregation that those who specialize in statistically-based empirical work, ever in search of a large "n," prefer, and the best of the prior research so acknowledges.[153]

Recent studies have persuaded us that, to the extent statistically-based empirical research can tell, strategic partisan behavior is dwarfed by other factors as a causal influence on the decisions federal judges make that create a vacancy.[154] Moreover, because our research is multi-method, we are aware of factors not previously considered, or buried in large data aggregations or in unhelpful explanations (such as "pension eligibility" or "pension qualification"),[155] that seem to us more likely to have had a significant influence on the decision to take senior status and thereby create a vacancy, particularly during the last twenty years. In that regard, we are more concerned about what causes judges to retire from regular active service (or from the office) than we are about whether partisan considerations affect the timing of that decision.

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151 *See, e.g.*, Albert Yoon, *Pensions, Politics, and Judicial Tenure: An Empirical Study of Federal Judges, 1869–2002*, 8 AM. L. & ECON. REV. 143, 147-48 (2006) (failing to reflect different requirements for senior status and retirement in the period from 1954 to 1983); *id.* at 174 ("Real salaries had a negligible effect on turnover rates . . . ."). Peretti and Rozzi also fail to distinguish the two in their recent study of Supreme Court "departures" after 1953. *See* Peretti & Rozzi, *supra* note 150, at 135.

152 *See* Albert Yoon, *As You Like It: Senior Federal Judges and the Political Economy of Judicial Tenure: 1945–2000*, 2 J. EMPIRICAL LEGAL STUD. 495, 526 (2005). Yoon's aggregate data cover a period, 1919–2002, during which there were two changes (in 1954 and 1984) in the rules governing eligibility for senior status.

153 *See, e.g.*, Richard L. Vining, Jr., *Politics, Pragmatism, and Departures from the U.S. Courts of Appeals, 1954–2004*, 90 SOC. SCI. Q. 834, 837-38 (2009).

154 *See* Peretti & Rozzi, *supra* note 150, at 139 (asserting that there is a "clear consensus regarding the powerful effect of pension eligibility on retirement decisions" from the lower federal courts); Vining, *supra* note 153, at 847-52 (referring to pension eligibility and financial incentives for voluntary departures); Richard L. Vining, Jr., *Judicial Departures and the Introduction of Qualified Retirement, 1892–1953*, 30 JUST. SYS. J. 139, 139 (2009) (arguing that "personal and institutional factors were more influential than political considerations" in judicial retirements and resignations).

155 *See* Peretti & Rozzi, *supra* note 150, at 139 ("pension eligibility"); Albert Yoon, *Love's Labor's Lost? Judicial Tenure Among Federal Court Judges: 1945–2000*, 91 CALIF. L. REV. 1029, 1048-49 (2003) ("pension qualification"). In addition, changes in the rules regarding both senior status and retirement during the period studied (1945–2000) call into question Yoon's use of "pension qualification." Vining acknowledges that statistical analysis of systematic data cannot capture a host of potential personal considerations that may influence judges. Vining, *supra* note 153, at 840 n.12.

Increasingly over the period covered by this study, we would expect the desire to create a vacancy to have been a major influence on decisions to assume senior status. We would also expect that concern for the judge's court, colleagues, and the judiciary animated that desire far more often and far more powerfully than did strategic considerations, partisan or personal.

b. *Disabilities (Disadvantages)*

i. Those Imposed by Statute

Judges in senior status are not eligible to serve as chief judge of their courts[156] and do not have the power to make appointments to statutory positions or designate permanently a depository of funds or a newspaper for publication of legal notices.[157] With the exception of district judges in senior status who qualify under the 2008 legislation discussed previously,[158] they also do not have the right to vote on administrative matters. Circuit judges in senior status are disabled from serving on an en banc court unless it is reviewing a decision of a panel of which the judge was a member,[159] and they are not entitled to preside on regular panels on the basis of their seniority.[160] Statutory provisions also disable them (although not district judges in senior status, who may be elected) from membership on the Judicial Conference.[161]

Following the 2008 legislation, and with the exception of the eligibility requirements for salary increases, which we discuss below, it is difficult to believe that any statutory disability would influence a district judge's choice to remain in regular active service (or to fully retire).

In terms of statutory disabilities, circuit judges in senior status are comparatively disadvantaged. The 2008 legislation regarding participation in administration does not include them. Moreover, on the assumption that judicial work is what most interests federal judges,[162] we would expect the (statutory) inability of circuit judges in senior status to participate in most en banc decisions to be a powerful influence to remain in regular active

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156 28 U.S.C. §§ 45, 136 (2006).

157 *Id.* § 296.

158 *See supra* text accompanying note 125.

159 28 U.S.C. § 46(c).

160 *Id.* § 45(c).

161 *Id.* § 331.

162 *See* Wilfred Feinberg, *The Office of Chief Judge of a Federal Court of Appeals*, 53 FORDHAM L. REV. 369, 384 (1984) ("For most federal judges, including this one, deciding cases is much more interesting than presiding at, or preparing for, meetings.").

service, perhaps overshadowing the (statutory) inability to preside, even though presiding carries with it the possibility of assigning the opinion.

Finally, our focus group interviews suggested that, just as qualifying for a salary increase may serve as a financial incentive affecting behavior—as, for instance, of a judge who wants to retire fully but at a higher salary—the process of annual certification should be considered a condition of employment potentially affecting judges' choices. That possibility is also raised by information furnished in response to our circuit executive questionnaire.

Although apparently straightforward and uniform, the statutory requirements for certification are neither. They are, rather, the first layer in a regulatory regime that is in large part opaque. As required by the statute, the Judicial Conference has promulgated rules to guide "[d]eterminations of work performed."[163] At the circuit level, responses to our circuit executive questionnaire reveal substantial differences across an array of issues, including (1) whether the circuit has its own written policies or guidelines for implementing the requirements, (2) what, if any, benchmarks from regular active service are used as denominators to determine whether a judge in senior status has met the 25% minimums, and even (3) whether, as the statute seems to contemplate, annual reporting is required in connection with annual certification.

With the benefit of hindsight, all of the prospective policymaking and annual administrative effort devoted to the process of certifying the workload of judges in senior status over the last twenty years has been a waste of time and money. From that perspective, it is difficult to criticize circuits for failing to add additional layers of formality to an academic exercise, particularly since neither the statute nor the Judicial Conference's rules require them to do so. Indeed, the latitude for discretionary decision-making that the Conference's rules accord circuit chief judges is striking.[164]

Although the Judicial Conference's rules appear intended to be as benign as possible, we learned from our focus group interviews that some judges find the entire process demeaning and that others resent the possible effects on certification of the fact that a 25% workload on some courts is virtually a full workload on others. Any such resentment might be due in part to the failure of circuits that have opted for determinate "workload equivalencies" to implement the latitude to take account of regional or national variation that the Judicial Conference's rules confer.

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163 28 U.S.C. § 371 (e)(2).

164 *See* SENIOR STATUS AND RETIREMENT, *supra* note 144, at app. B 106-07.

ii. Those Not Imposed by Statute

The nonstatutory disabilities or disadvantages of senior status most likely to be salient to career choices are changes in space/facilities and staff that may result from exercising the privilege to reduce work. The scope of potential concern here is greater for district judges than for circuit judges, because, although both groups are concerned about chambers, secretaries, and law clerks, only the former need worry about courtrooms and courtroom staff.

In 1944, when Congress clarified the requirement that a judge in senior status must be designated and assigned in order to continue providing judicial services, the Chairman of the House Judiciary Committee observed that "[t]he facilities for holding court are not available to [a judge in senior status]. He has to sit in a courtroom that is regularly assigned to some other judge. He has no chambers."[165] Another Congressman argued in support of the proposed legislation that "[i]t w[ould] not cost the Government any money, but w[ould] permit and enable the retired judges, or those who have been disabled . . . to serve the Government without extra pay."[166] These statements were consistent with the view expressed twenty-five years earlier that continued judicial service by judges in senior status would represent a free good from an institutional perspective.[167]

If the norm in 1944 was that judges in senior status had neither chambers nor courtrooms, it soon changed. At a 1950 meeting, the Judicial Conference

> directed that the Director [of the Administrative Office] permit [judges in senior status] to retain their personnel and be furnished with suitable quarters, provided that they continue to perform substantial judicial work, [and] that the question as to whether or not the services performed are substantial will be a matter for determination by the particular circuit judicial councils involved.[168]

Forty years later, the Administrative Office prepared a chart for the Judicial Conference Committee on the Judicial Branch that described the

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165 90 CONG. REC. 3871 (1944) (statement of Rep. Walter).

166 *Id.* at 3870 (statement of Rep. Sabath). On the use of "retired judges," see *supra* note 7.

167 *See supra* text accompanying note 24.

168 ADMIN. OFFICE OF THE U.S. COURTS, REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 22 (1950), *available at* http://www.uscourts.gov/FederalCourts/JudicialConference/Proceedings/Proceedings.aspx?doc=/uscourts/FederalCourts/judconf/proceedings/1950-09.pdf.

practices of the circuit councils in applying the Judicial Conference's standard of "substantial judicial work."[169] The chart was evidently the basis for the Committee's observation, in its September 1989 report to the Conference, that "[t]here is a great deal of variation among the circuits as to their policies for certifying staff and chambers."[170] The Committee endorsed leaving responsibility for staff and chambers to the councils because it "ultimately allows for a flexible, reasoned approach to a variety of unusual and changing work situations."[171]

Today, the councils continue to guard their prerogative to deal with the assignment of staff and space to judges in senior status according to their own views about what constitutes "substantial judicial work." Whereas, however, in 1989, five of the regional circuits had written guidelines (or draft guidelines) on the subject,[172] the responses to our circuit executive questionnaire reveal that in 2012 eleven circuits have such guidelines, although some of them apply only to staff. In addition, although the 1989 chart characterized the minimum workload requirements for staff and chambers of eight circuits (out of eleven responding to the question) as "subjective,"[173] today eleven circuits prescribe determinate requirements as a floor both for staff and chambers and for additional staff.

Although the focus of the circuits' policies and practices regarding staff for judges in senior status has been on the number and types of staff available at particular workload levels, focus group interviews alerted us to the concern that some judges have about the effect of assuming senior status on the quality of the law clerks they can attract. This concern might at the margin prompt a judge who foresaw maintaining a substantial caseload to remain in regular active service.

One part of the space landscape has recently been occupied by the Judicial Conference. Under pressure from Congress, and confronted with government reports about space usage[174] that are as critical as, in the view of

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169 *See* Circuit Practices—Senior Judge Staff and Chambers (June 1989) (on file with authors); Letter from William R. Burchill, Jr., Gen. Counsel, Admin. Office of the U.S. Courts, to Stephen Burbank (Aug. 17, 1989) (on file with authors).

170 REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON THE JUDICIAL BRANCH 7 (1989) (on file with authors).

171 *Id.* at 7.

172 *See* Circuit Practices, *supra* note 169.

173 *Id.*

174 *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-417, FEDERAL COURTHOUSE CONSTRUCTION: BETTER PLANNING, OVERSIGHT, AND COURTROOM SHARING NEEDED TO ADDRESS FUTURE COSTS 42 (2010) [hereinafter BETTER PLANNING]; U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-613, FEDERAL COURTHOUSES: RENT INCREASES DUE TO NEW

the institutional judiciary, they are ill-informed,[175] the Conference prescribed courtroom sharing as a norm for district judges in senior status in new courthouse construction. In particular, the Conference adopted a norm of one courtroom for every two judges in senior status.[176]

Prescribing norms for new construction seems to some judges we talked to in focus group interviews an exercise in wishful thinking, and the 2008 policy does not in any event confront criticisms based on current courtroom usage. The same interviews left no doubt in our minds that courtrooms and courtroom staff are dear to many district judges, and thus that the potential loss of either may be a choice-influencing consideration.

E. *The Questionnaire Survey*

Mindful of the limitations of empirical research that relies primarily on statistical modeling, particularly research that neglects important institutional characteristics, and committed more generally to a multi-method approach, we determined to test our hypotheses concerning behavioral influences by designing a questionnaire to be completed by judges in senior status. We also sought to use this instrument to gather additional information about these judges, including their views on questions that may be important to the policy dimensions of our study.

We sent our questionnaire to 407 judges, which was the entire population of judges in senior status that we identified from the relevant Administrative Office database as of July 2010. Of the 338 responses we received (an extraordinary 83% return rate), we determined that 21 should be excluded because they lacked answers to substantial portions of the questionnaire, leaving us with 317 responses (a 77.9% effective response rate).[177]

SPACE AND GROWING ENERGY AND SECURITY COSTS REQUIRE BETTER TRACKING AND MANAGEMENT 39 (2006) [hereinafter RENT INCREASES].

175 *See* Letter from James C. Duff to Mark Goldstein, Dir., Physical Infrastructure, Gov't Accountability Office (June 1, 2010), *in* BETTER PLANNING, *supra* note 174, at app. 69 (noting "serious concerns about the accuracy of the key data, the misleading way in which information is presented, and the soundness of methodologies employed to substantiate the draft report's conclusions"); Letter from Leonidas Ralph Mecham to Mark Goldstein, Dir., Physical Infrastructure Gov't Accountability Office (June 6, 2006), *in* RENT INCREASES, *supra* note 174, at app. 48 ("[T]he study design and methodology were seriously flawed, rendering [the draft report's] primary conclusions unfounded.").

176 *See* JUDICIAL CONF. OF THE U.S., *supra* note 127, at 10.

177 Not every respondent answered every question, although all 317 answered enough questions to make their responses as a whole useable. We included in this total four responses from judges of the Court of International Trade in senior status.

Having first invited respondents to correct the information from the public record that we included in the cover letter,[178] we asked them to identify the extent to which nine specified considerations influenced their decision to take senior status, scaled from one (not at all important or not applicable) to seven (very important), and also invited them to mention other influences. We followed the same format in inquiring about the respondents' experience of serving in senior status and about what influenced them to remain in senior status instead of fully retiring. We then asked respondents questions about their average caseload since assuming senior status, and how satisfied they were with their decision to assume and remain in senior status. Following a question that invited open-ended comments pertinent to our study, we asked respondents to identify from a menu their principal professional activity immediately before appointment to the bench and, separately, during their entire pre-judicial career. The final questions inquired about respondents' race and gender.

As in all of our questionnaires, we assured respondents that their privacy would be protected and that individual names would not be identified with responses without specific permission. To that end, the questionnaire forms to be completed and returned were labeled only with codes—no names—and only the senior researchers had the code lists.

Of 299 judges who answered the question about race, 277 identified themselves as White, 12 as African-American, 6 as Hispanic/Latino, 2 as Asian, and 2 as Other. Of the 300 judges who answered the question about gender, 275 identified themselves as males and 25 as females.[179] As to professional backgrounds, of 313 judges responding, 232 (74.1%) identified private practice as their principal pre-judicial activity, 36 (11.5%) law practice with a government agency, 22 (7.0%) government service other than law, 2 (0.6%) business or industry, and 22 (7%) "Other."

We note two aspects of these data. First, Russell Wheeler has demonstrated the importance of distinguishing between appointments directly from private practice and appointments of those with private practice-

[178] The information concerned year of appointment, court, appointing President, and years in which respondents became eligible for and assumed senior status.

[179] Colleagues we consulted about questionnaire design suggested putting these questions last—which we did—because some people find them offensive, an attitude that might affect their willingness to continue answering the questionnaire. The decline in the number of judges answering these questions from the total number returning usable questionnaires may support that view, as do a number of comments received on questionnaire responses.

dominated pre-judicial careers.[180] We asked questions designed to secure information about both aspects of the backgrounds of our respondents. The percentage of respondents appointed directly from private practice was 58%. Second, even as to appointment directly from private practice, the judges returning our questionnaire were already in senior status, some of them for many years, when they responded. As a result, the comparison data to be sought are those collected for administrations going back decades, not data on recent appointments.[181]

Finally by way of the background data sought in our questionnaire, (1) no respondent identified a caseload of "none or very little," (2) 39 respondents (12.9%) identified their caseloads as "about 25 percent" of the typical caseload of a judge on their court in regular active service, (3) 94 (30.3%) as "about 50 percent," (4) 71 (22.9%) as "about 75 percent," and (5) 106 (34.2%) as "a full caseload or close to it." These data suggest that the 313 respondents to this question consisted overwhelmingly, if not exclusively, of judges in senior status with chambers and staff, of whom there were 356 in September 2009, and thus that the response rate was even more robust than it appears to be when judges in senior status without chambers and staff are included in the denominator.

Of course, as suggested in one of our focus group interviews, some judges in senior status may exaggerate their workloads. An alternative explanation to exaggeration is that, even among judges in senior status with chambers and staff, our respondent pool is biased (through self-selection) towards those with heavier workloads. In that regard, some 15 respondents to the questionnaire—all district judges—commented that they had not reduced their workload, or had not done so to the extent they would like, because of their courts' caseloads and their sense of obligation to their colleagues.[182]

Turning to the core of the questionnaire, in Table 7 we present the mean scaled responses to the question probing the factors that influenced

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[180] *See* Russell Wheeler, *Changing Backgrounds of U.S. District Judges: Likely Causes and Possible Implications*, 93 JUDICATURE 140, 143-44 (2010) ("In short, most district judges appointed from the judiciary had private practice–dominated careers before becoming judges, but the length of those careers has decreased.").

[181] *See, e.g.*, *id.* at 141 tbl.1. It is also worth noting that "current levels are roughly equal to those of the presidential administrations of Franklin D. Roosevelt and Harry S Truman." RUTKUS, *supra* note 129, at 7.

[182] Responses to Letter from S. Jay Plager, Circuit Judge, U.S. Court of Appeals for the Fed. Circuit (Sept. 1, 2010) (on file with authors). Hereinafter we will cite these responses, whether individual or collective, as "Responses to Sept. 1 Letter." This convention does not imply that we are citing to the same response or responses. We do this to respect our respondents' anonymity.

respondents to take senior status. Again, the scale was from one (not at all important or not applicable) to seven (very important), with four being somewhat important. The results are ranked in descending order by overall mean.

Table 7: Taking Senior Status—Mean Responses

	Overall	District	Circuit
I wanted to help the court by creating a vacancy.	4.48	4.75	3.59
I wanted the federal tax advantages senior status affords.	4.22	4.33	3.81
I wanted the ability to be selective about my case load.	3.68	3.77	3.41
Other interests made me want a lighter case load.	3.24	3.15	3.75
I wanted the available state or local tax advantages.	2.91	3.05	2.24
I wanted the opportunity to sit with other courts.	2.58	2.54	2.76
Family concerns made me want a lighter case load.	2.11	1.97	2.68
Health concerns made me want a lighter case load.	1.62	1.62	1.70
I wanted additional teaching income.	1.27	1.18	1.63

As our other research had led us to expect, the most important influences on the decision to assume senior status were the desires to help the court by creating a vacancy, to enjoy the federal tax advantages that senior status entails, and to reduce or be selective about caseload. The strength of these choice-influencing considerations varied somewhat as between district judges and circuit judges. Indeed, we had hypothesized that, because of workload differences, district judges would identify the ability to be selective about caseload as significantly more important than circuit judges. Consistent with that hypothesis, the difference in means is statistically significant ($p < .001$).[183]

[183] For this and all other difference of means tests as between district judges and circuit judges, we excluded responses from judges of the Court of International Trade.

The strength of the desire to help the court by creating a vacancy also varied among circuits (including both circuit and district courts). It was at its apex in the Second Circuit (combined mean of 5.4), followed by the Fourth Circuit (5.0) and the Eleventh Circuit (4.9).[184] The high mean for the Second Circuit supports its reputation, reported to us in focus group interviews, as having a culture of taking senior status upon eligibility or shortly thereafter. Also supporting that reputation is the fact that of the 63 judges we identified as continuing to serve in regular active service for three or more years after satisfying the Rule of 80, only 2, 1 district court judge and 1 circuit judge, serve in the Second Circuit. As discussed below in connection with data about en banc activity, such a culture may, for circuit judges, be linked to a culture of avoiding en banc review.[185]

Although consistent with our expectations, the fact that federal tax advantages were the second most powerful influence (combined) on the respondents' decisions to assume senior status is striking. It indicates how important what might to others seem a small amount of money has become to federal judges after twenty years of no salary increases and intermittent COLAs. Indeed, two respondents suggested that Congress's behavior had led to *premature* assumptions of senior status.[186] Another judge, who has remained in regular active service, told us that he would "hate to be forced into senior status 'for the money,' but it is a possibility."[187] We did not believe that there would be any significant differences between district judges and circuit judges as to tax advantages and were surprised to observe the large difference with respect to state or local tax advantages, and to learn that it is statistically significant ($p < .012$). The much higher mean among district court judges in senior status probably results from their (much) greater numbers in the respondent pool and hence in the non-randomly distributed locations where such tax advantages exist.

We believed that there might be a significant difference in the mean valence of one other choice-influencing consideration among district and circuit court respondents. Because more law professors were appointed to the circuit courts than to the district courts in the presidential administrations

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184 The means for all regional circuits are: 4.38 (1st Cir.), 5.40 (2d Cir.), 4.22 (3d Cir.), 5.00 (4th Cir.), 4.45 (5th Cir.), 4.04 (6th Cir.), 4.65 (7th Cir.), 4.65 (8th Cir.), 4.68 (9th Cir.), 3.55 (10th Cir.), 4.94 (11th Cir.), and 2.17 (D.C. Cir.).

185 According to Judge Feinberg a "tradition [in the Second Circuit] that goes back to Learned Hand[] is that in bancs are not encouraged." Feinberg, *supra* note 162, at 376.

186 Responses to Sept. 1 Letter, *supra* note 182.

187 Letter from a district judge to S. Jay Plager, Circuit Judge, U.S. Court of Appeals for the Fed. Circuit (July 2, 2010) (on file with authors).

primarily of interest,[188] and because of the nature of their respective judicial work, we expected that the desire to earn additional teaching income would be a significantly more powerful influence among circuit judges, as it proved to be ($p < .032$). For a few in our survey, the "escape from the cap on teaching income was paramount."[189] Another respondent observed, "If my judicial salary had been raised according to cost of living I would have been willing to sit more and teach less."[190]

Although a considerably less powerful influence on our respondents' decisions to assume senior status than most of those previously discussed, the opportunity to sit with other courts was, after all, on average more powerful than the desire to earn additional teaching income, health concerns, and family concerns. This finding is in line with our expectation as a result of interviews with two judges who have served as Chair of the Judicial Conference's Committee on Intercircuit Transfers.

In spaces on the questionnaire provided to list other influences, 11 respondents volunteered that strategic considerations affected their decisions, usually in favor of taking senior status but in one instance delaying it (at the request of a Senator).[191] In three instances the strategic consideration was to advance other peoples' opportunities for federal judicial service,[192] and in another it was to enable another sitting judge to relocate.[193]

Our data on when judges assume senior status do not support the assertion of one respondent (a circuit judge) that "most senior-eligible judges (not all) hang on until their replacement will be selected by a president they prefer politically."[194] Nor is it supported by the best of the prior research that focuses on strategic partisan retirement. Moreover, the assertion relates to timing rather than to the basic decision to assume senior status. Only six of these respondents indicated a desire to benefit a President of the same party as the President who appointed them by creating a vacancy,[195] and one

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188 During the administrations of Presidents Carter, Reagan, George H.W. Bush, and Clinton, 18 law professors were appointed to the district courts, while 24 were appointed to the courts of appeals. Sheldon Goldman et al., *W. Bush's Judiciary: The First Term Record*, 88 JUDICATURE 244, 269 tbl.2, 274 tbl.4 (2005). Obviously the difference becomes much more pronounced when one considers the respective total numbers of district and circuit judges.

189 Responses to Sept. 1 Letter, *supra* note 182.

190 *Id.*

191 *Id.*

192 *Id.*

193 *Id.*

194 *Id.*

195 *Id.*

acted to implement a previous agreement with a senatorial sponsor.[196] The choices of four of these seven judges suggest that politics was merely one of a number of considerations affecting their decisions. For three of them, however, politics evidently drove the decision (not just its timing).[197]

None of these responses suggests difficulty being candid. Perhaps other respondents exaggerated the influence that economic incentives played in their decision, but that would confound economic theories of human behavior. Of course, the non–self-regarding nature of the desire to help the judge's court by creating a vacancy—the other prime candidate for exaggeration—does not sit easily with those theories. Yet, given statistical evidence of judges in senior status working much harder than they need to, even to qualify for salary increases,[198] and powerful anecdotal evidence that concern for colleagues animates many of them, this seems another occasion to "prefer the messiness of lived experience to the tidiness of unrealistically parsimonious models,"[199] whether their origins are in economics or political science.

Finally, with respect to the decision to assume senior status, we hypothesized that a private practice–dominated pre-judicial career might reduce the influence of one or more of the financial incentives that we posited as choice-influencing considerations (items 2-4). However, we found no statistically significant difference.

Table 8 presents the responses to the question asking respondents to describe their experience while serving in senior status.

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196 *Id.*

197 *Id.*

198 *See supra* text accompanying notes 119-23.

199 Stephen B. Burbank, *On the Study of Judicial Behaviors: Of Law, Politics, Science and Humility*, *in* WHAT'S LAW GOT TO DO WITH IT? WHAT JUDGES DO, WHY THEY DO IT, AND WHAT'S AT STAKE 41, 53 (Charles G. Geyh ed., 2011).

Table 8: Serving in Senior Status—Mean Responses

	Overall	District	Circuit
I have adequate support staff.	6.63	6.67	6.46
My office and related facilities are satisfactory.	6.62	6.64	6.54
Senior status has not changed my relationship with colleagues.	6.07	6.24	5.38
I am treated as a full Article III judge.	5.87	6.08	5.22
I am able to attract top-flight law clerks.	5.85	5.92	5.60
I regard certification (for purposes of eligibility for a salary increase) as wise public policy.	5.47	5.69	4.62
My income is adequate for my needs.	4.98	5.05	4.76
I have adequate time to pursue personal interests such as hobbies, travel, etc.	4.85	4.80	5.05
I have adequate opportunity to participate in judicial administration.	4.04	4.21	3.43
I take advantage of and enjoy the opportunity to sit on other courts.	3.19	3.19	3.19

In light of the comparatively greater statutory disadvantages of senior status for circuit judges, we expected district judges in senior status to be more affirmative about treatment "as a full Article III judge" and about the adequacy of their opportunities to participate in judicial administration. The differences in means are significant for both ($p < .01$, $p < .02$). In part for the same reason, and in part because of differences in the salience of colleagueship on the two courts, we had a similar expectation regarding the effect of senior status on relationships with colleagues. Again, the difference of means is significant ($p < .01$).

We did not predict, and cannot confidently explain, the sizeable difference in means between the attitudes toward certification of district and circuit judges in senior status, a difference that is also statistically significant ($p < .01$). In fact, the great majority of critical comments about certification came from district judges in senior status.

Overall, the responses to this set of propositions suggest that judges in senior status are quite satisfied with their experience, even if they do not all share the view of one of our respondents that "[s]enior status is going to heaven without dying."[200] As an example, the concern about the ability to

[200] Responses to Sept. 1 Letter, *supra* note 182.

continue to attract superior law clerks that we heard in a few focus group interviews did not appear to trouble very many of these respondents. The response of one of them may suggest why: "Anyone can attract top-flight law clerks in this economy."[201] We need not rely on inference, however, to assess the level of satisfaction among respondents, since we asked the question directly. The mean response for district judges in senior status to the question, "In general, how satisfied are you with your decision to assume and remain in senior status," was 6.53; for circuit judges in senior status it was 6.37.

Here too, however, looking at the numbers alone could be misleading. Thus, the comparatively lower means for "adequate time to pursue personal interests" may reflect the fact that, as previously observed, a substantial number of respondents stated that they were working harder than they wished to work because of their courts' caseloads and their sense of obligation to fellow judges.[202] Even more revealing are the comments that the proposition, "My income is adequate for my needs," elicited. With the benefit of hindsight, perhaps we should have rephrased this proposition as "My salary is adequate for my needs." A number of respondents noted that their scaling reflected other sources of income, whether an inheritance, a successful spouse, or teaching income.[203] Indeed, in our focus group interviews one judge observed that, without the additional teaching income available in senior status, he probably would have retired and taken up alternative dispute resolution (ADR), and a number of respondents made similar comments.

Our phrasing did not, however, deter respondents from expressing their unhappiness with Congress's failure to provide a periodic salary increase and annual COLAs, or their belief that this behavior manifested lack of respect. Many federal judges believe that annual COLAs were promised as a quid pro quo for the additional disabilities imposed by the Ethics Reform Act of 1989, and that Congress has broken faith by not providing them.[204] More ominously, some 14 respondents said that they were considering

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201 *Id.*

202 *Id.* By contrast, one respondent attributed his or her decision to assume senior status to an overwhelming caseload and the need to devote adequate attention to each case. *Id.*

203 *Id.*

204 *See id.; see also supra* text accompanying note 130. On October 5, 2012, the U.S. Court of Appeals for the Federal Circuit sitting en banc held that, in blocking COLAs in 1995, 1996, 1997, and 1999, Congress violated the Compensation Clause of Article III. The court also held that Congress lacked statutory authority to withhold COLAs in 2007 and 2010. Beer v. United States, No. 2012-5012, 2012 WL 4748830 (Fed. Cir. Oct. 5, 2012).

retirement in order to earn more money,[205] and a few others asserted that they would have retired years ago had they known that Congress would fail to grant a salary increase and annual COLAs.[206]

Conversely, a number of responses, presumably from those no longer able to take advantage of the potential financial benefits of full retirement, suggest either that the judges were remaining in senior status in the hope of receiving a salary increase or COLA,[207] or that those incentives may affect behavior regarding certification for salary increases ("I fear that certification for salary increase may prompt judges to sit who are not well-able to sit.").[208] Again, however, we found no support for the hypothesis that responses to a proposition implicating the respondent's financial circumstances—here regarding adequacy of income—vary depending on pre-judicial career. In particular, the difference in means between respondents with, and those without, a private practice–dominated pre-judicial career was not statistically significant.

Many respondents to this question took the opportunity to express concerns about the current disadvantages that senior status entails, at least on their courts. Thus, several circuit judges in senior status criticized either their inability to preside and make opinion assignments,[209] their inability to vote on whether en banc review of a panel decision should occur (acknowledged to be a statutory disability),[210] or the inability even of those carrying a significant load to be active in administrative work.[211] District judges in senior status expressed concern about "intangible changes in how one is treated by colleagues, lawyers, and the public,"[212] having to keep a full caseload in order to "insure that I have my own court reporter,"[213] and "having difficulty getting court reporters to assist me with trials, hearings, etc."[214]

A number of respondents in both groups dislike the title "Senior Judge."[215] Some, particularly those carrying a heavy workload, resent the misleading impression of retirement or inactivity that the title may convey to the bar, litigants, and the public. Others seemingly share the concerns of

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205 Responses to Sept. 1 Letter, *supra* note 182.
206 *Id.*
207 *Id.*
208 *Id.*
209 *Id.*
210 *Id.*
211 *Id.*
212 *Id.*
213 *Id.*
214 *Id.*
215 *Id.*

a judge in one of our focus group interviews who delayed taking senior status out of concern about the impact of a change in status on that judge's ability effectively to preside over long-running structural reform litigation. Ironically, the designation "senior judge" was initiated by statute at the request of the Judicial Conference in an attempt to obviate similar criticisms of referring to judges in senior status as "retired."[216] In fact, many judges use the title of the office to which they were appointed and still hold: district judge or circuit judge.

Designation and assignment is one of several aspects of senior status that have raised constitutional concerns.[217] We deem the constitutional argument chiefly of academic interest,[218] which is to say that it seems unlikely that the courts would hold the mere requirement—as opposed to the manner of its exercise—unconstitutional. In that respect, we liken it to the power of circuit councils to certify a federal judge's (involuntary) disability, creating a vacancy and causing the judge so certified to lose potentially everything but the office and the salary.[219] In both situations, it is possible to imagine actions that could raise constitutional questions.[220] In 2007, a distinguished judge in senior status observed with respect to designation and assignment that "the requirements of § 294 have proven to be pro forma as long as the judge is rendering 'substantial service,' and they have had little impact on deterring judges from taking senior status."[221] He also wrote that he "kn[e]w of no case in which this 'veto power' ha[d] been exercised."[222] In the course of our research we have been alert to any evidence of abuse in the exercise of the designation and assignment power. Accordingly, we are concerned about comments from a few respondents suggesting that the treatment of judges in senior status lacks evenhandedness and falls short of Judicial Conference policy, which calls for a norm of

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216 H.R. REP. NO. 85-171, at 4 (1957).

217 *See, e.g.*, David R. Stras & Ryan W. Scott, *Are Senior Judges Unconstitutional?*, 92 CORNELL L. REV. 453 (2007).

218 *See* Betty Binns Fletcher, *A Response to Stras & Scott's* Are Senior Judges Unconstitutional?, 92 CORNELL L. REV. 523, 525 (2007) ("I admire the authors' imaginations—posing what I see as imaginary problems and nonsolutions to the problems they have created.").

219 *See* 28 U.S.C. §§ 372(b), 354(a)(2)(B)(i) (2006). For the antecedents of this legislation, see *supra* text accompanying notes 17-19, & 28.

220 *See* REPORT OF THE NATIONAL COMMISSION, *supra* note 5, at 15-17.

221 Block, *supra* note 135, at 542.

222 *Id.*

equal treatment.[223] One respondent commented that the "treatment of seniors on my court has caused a number of judges to delay going senior."[224] Another judge observed that dislike of a "senior's politics" leads the chief judge to "move[] against the senior's docket."[225]

The response to our circuit executive questionnaire from one circuit acknowledged judges' occasional expressions of displeasure about "loss of chambers and/or courtrooms and the ability to participate in certain court matters" and "anecdotal evidence that some judges have delayed taking senior status over such concerns."[226] Comments of a similar tenor from judges who have either retired or remained in regular active service, combined with statistical evidence concerning those phenomena, suggest that there are legitimate concerns.

Similarly worrisome is a comment from a district judge in senior status: "Recent efforts to impose a 50% work requirement on senior judges in this circuit have made me believe that senior judges make a convenient target that active judges avoid (see e.g. courtroom sharing for senior judges)." This judge added: "If I had been more aware of that climate I might have reconsidered my decision."[227]

We turn finally to the question of what influences judges to remain in senior status instead of fully retiring. Table 9 presents the statistical results of our inquiry.

Table 9: Senior Status Instead of Retirement—Mean Responses

	Overall	District	Circuit
I like the judicial work of a judge.	6.63	6.69	6.39
I like my colleagues.	6.28	6.39	6.90
I like the working conditions of a judge.	6.26	6.30	6.14
I view this as a lifetime position (or until unable to fulfill the duties of a judge).	6.08	6.16	5.75

223 *See* JUDICIAL CONF. OF THE U.S., STRATEGIC PLAN FOR THE FEDERAL JUDICIARY 9 (2010) [hereinafter STRATEGIC PLAN]; JUDICIAL CONF. OF THE U.S., LONG RANGE PLAN FOR THE FEDERAL COURTS 84 (1995) [hereinafter LONG RANGE PLAN].

224 Responses to Sept. 1 Letter, *supra* note 182.

225 *Id.*

226 A circuit judge in senior status (from another circuit) asserted that the court's staff "tends to treat me in a manipulative manner" and that "[a]ssigning judges tend to give seniors the most onerous cases." *Id.*

227 *Id.*

I enjoy the respect shown to a judge.	5.44	5.57	4.97
I am not interested in the typical professional activities of retired judges.	4.37	4.41	4.17
I do not know what I would do if I retired from judicial office.	3.91	3.91	3.81
I like the administrative work of a judge.	3.54	3.64	3.03

We hypothesized that the greater degree of autonomy that district judges enjoy with respect to their work, judicial and administrative, would lead to greater satisfaction with that work. As predicted, the differences in means for both of the pertinent propositions are statistically significant ($p < .015$, $p < .015$). We also predicted that the nature and frequency of their interactions with colleagues, the bar, litigants, and the public would yield higher means for propositions probing collegial relationships and professional respect. Again, the differences in means as to both are statistically significant ($p < .002$, $p < .015$).

The perspective informing the proposition, "I view this as a lifetime position (or until unable to fulfill the duties of a judge)," was well expressed by Dan McGill, a consultant to the National Commission on Judicial Discipline and Removal: "The President tenders an offer of lifetime employment with no diminution in compensation with the tacit assumption that acceptance of the offer carries with it a reciprocal commitment to render judicial service at some level of activity as long as the health and energy of the individual permits."[228]

The strong influence of that proposition is in tension with numerous comments, discussed above, indicating that, because of financial concerns, respondents were actively considering retirement or that they would have retired years earlier had they known that Congress would fail to provide a salary increase or annual COLAs. It is, however, consistent with the comments, also previously discussed, of respondents unwilling to abandon their colleagues at a time when new judgeships are not being created, vacancies are high, and when, in part as a result, in some courts workloads are staggering. Moreover, it is also consistent with another set of comments, which manifest a strong sense of obligation to render public service and thus challenge the premises of public choice theory as applied to the federal

[228] Dan M. McGill, *Disincentives to Resignation of Disciplined Federal Judges in the Benefits Package of the Federal Judiciary*, *in* 2 RESEARCH PAPERS OF THE NATIONAL COMMISSION ON JUDICIAL DISCIPLINE & REMOVAL 1221, 1245 (1993).

judiciary. As one respondent observed, "When people ask me about what it means to be senior and I explain the financial aspects, they think that I must be crazy to work for nothing. I don't think so."[229] Taken together, however, the three sets of comments may suggest that additional erosion of the sense of obligation—the evident disillusionment of some judges signals that the process is underway—will lead to more decisions to retire rather than to assume or to remain in senior status.

The comments we received suggest the salience of a number of choice-influencing considerations that are not obviously captured in, or that bring alive some of, the posited propositions. Thus, for some judges, particularly as they get older or after they have lost a spouse, remaining in office provides important psychic income, close friendships with colleagues and staff, and an escape from loneliness or boredom ("I don't play golf or fish . . . I enjoy the work and the people with whom I work").[230] Finally, judges in senior status contemplating retirement consider alternatives in addition to golf and fishing. As some of our interviews suggested, their reported satisfaction level may reflect a comparison with the lot of other lawyers. One judge we interviewed observed that "many sixty-five year old lawyers are depressed." At least if that remark concerned lawyers no longer allowed to work, it suggests the broader phenomenon captured in research documenting that workers over sixty are twice as likely to report good to excellent health as are their nonworking counterparts.[231]

In sum, the opportunities to continue doing important and prestigious public service; to do that work surrounded by interesting colleagues, assisted by able staff, in pleasant surroundings; and to adjust the amount of that work in light of other interests, family and personal (including health) concerns, and the inevitable limitations imposed by advancing age—all help to explain why service in senior status remains highly valued by most respondents. As Dan McGill put it, "the opportunity to continue practicing one's craft in the public interest at a tolerable level of activity into advanced years has great appeal for intellectually oriented people."[232]

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229 Responses to Sept. 1 Letter, *supra* note 182.

230 *Id.*

231 *See* HE ET AL., *supra* note 61, at 89, 91.

232 McGill, *supra* note 228, at 1240.

IV. RETIREMENT

A. *Introduction*

In an effort to present a comprehensive picture of judicial retirement behavior over the years covered by our study, we pursued two parallel efforts. First, in order better to understand the recent history of retirement, we essentially replicated for retirement in the years between 1970 and 2009 what Van Tassel did for resignation (and what we supplemented in Part II), using the same types of public sources. Second, informed by that research, we thought that our understanding of retirement would benefit from a multi-method approach that did not rely exclusively on historical research and secondary sources. Accordingly, we devised certain statistical analyses of the relevant data in the FJC's database and initiated a questionnaire survey of all judges now living that we could identify as having retired from the federal judiciary.

B. *The Demographic Data: Retirements 1970–2009*[233]

From 1970 through 2009, 2143 judges served on the lower federal courts. Overall, 101 (4.7%) of these judges retired during this period. Of the 1673 district judges eligible, 79 (4.7%) retired; of the 470 circuit judges eligible, 22 (4.7%) retired.

1. Frequency of Retirement

Table 10 presents retirement frequency data for all judges by year within decades. Tables 11 and 12 present the data for district and circuit judges.

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[233] We again express our appreciation to Dr. Margaret S. Williams, Senior Research Associate in the FJCs's Research Division, for her invaluable assistance in compiling and analyzing the data presented in this part. Any views inferable from her analyses are her own and not necessarily those of the Center. Again, the database does not include the circuit judges who sit on the United States Court of Appeals for the Federal Circuit, judges on the Court of International Trade, or the district judges who sit on the territorial courts. During the study period, three judges retired from the Federal Circuit, and two judges retired from the District of Puerto Rico.

Table 10: All Judges' Retirement (*n* = 2143 judges)[234]

Year	Eligible	Retired
1970	97	0
1971	94	0
1972	99	0
1973	95	0
1974	97	0
1975	87	0
1976	76	1
1977	66	0
1978	65	0
1979	52	0

Year	Eligible	Retired
1980	45	1
1981	40	0
1982	29	1
1983	22	0
1984	298	2
1985	318	3
1986	331	1
1987	337	4
1988	349	1
1989	358	0

Year	Eligible	Retired
1990	379	2
1991	391	3
1992	417	6
1993	426	0
1994	447	2
1995	468	5
1996	486	5
1997	497	5
1998	507	7
1999	509	3

Year	Eligible	Retired
2000	513	8
2001	527	4
2002	529	4
2003	532	4
2004	545	4
2005	554	7
2006	564	6
2007	575	4
2008	596	4
2009	627	4

Table 11: District Judges' Retirement (*n* = 1673 judges)

Year	Eligible	Retired
1970	61	0
1971	59	0
1972	64	0
1973	61	0
1974	62	0
1975	54	0
1976	46	1
1977	39	0

Year	Eligible	Retired
1980	27	0
1981	27	0
1982	19	1
1983	16	0
1984	226	1
1985	241	2
1986	251	1
1987	255	3

[234] Judges who retired under the special provisions for disability (voluntarily or involuntarily) were excluded from the count of retirees. There were five such judges.

1978	41	0
1979	30	0

1988	265	1
1989	269	0

Year	Eligible	Retired
1990	285	1
1991	297	2
1992	322	5
1993	323	0
1994	342	1
1995	363	2
1996	382	4
1997	390	3
1998	399	6
1999	396	1

Year	Eligible	Retired
2000	401	8
2001	404	4
2002	401	2
2003	403	4
2004	414	3
2005	418	7
2006	423	5
2007	436	4
2008	453	3
2009	475	4

Table 12: Circuit Judges' Retirement (n = 470 judges)

Year	Eligible	Retired
1970	36	0
1971	35	0
1972	35	0
1973	34	0
1974	35	0
1975	33	0
1976	30	0
1977	27	0
1978	24	0
1979	22	0

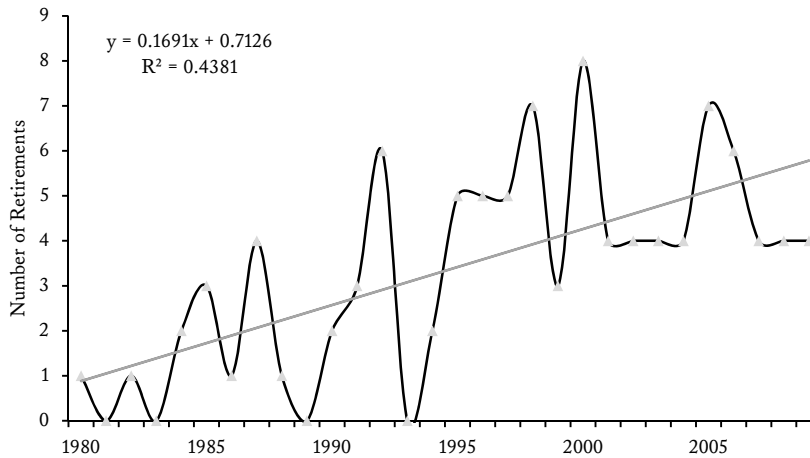
Year	Eligible	Retired
1980	18	1
1981	13	0
1982	10	0
1983	6	0
1984	72	1
1985	77	1
1986	80	0
1987	82	1
1988	84	0
1989	89	0

Year	Eligible	Retired
1990	94	1
1991	94	1
1992	95	1
1993	103	0
1994	105	1
1995	105	3
1996	104	1
1997	107	2
1998	108	1
1999	113	2

Year	Eligible	Retired
2000	112	0
2001	123	0
2002	128	2
2003	129	0
2004	131	1
2005	136	0
2006	141	1
2007	139	0
2008	143	1
2009	152	0

Table 10 reflects a substantial increase in the number of judges eligible to retire beginning in 1984. This increase was due to the statutory amendment effective in July of that year that changed eligibility for judicial retirement from age seventy (with ten years of service) to any combination of age and service totaling eighty starting at age sixty-five. Actual retirements increased as well. This general upward trend appears particularly dramatic when presented visually, as in Figure 4.

Figure 4: Judicial Retirements by Year, 1980–2009[235]



As this graph suggests, although retirements peaked in 2000, the long-term trend continues toward increasing numbers of retirements, even if the pace of acceleration has slowed in recent years. Explaining this apparent increase in judicial retirements based on the historical data is more difficult. The shift to the Rule of 80 in 1984 seems to have had an immediate—though slight—effect on retirements, but it alone cannot explain any long-term increase in the retirement rate. The question why pension-eligible judges chose to retire rather than assuming, or after assuming, senior status (or remaining in regular active service) cannot be answered by citing the rules for pension eligibility.

How the substantial increase in judicial salary in 1991 may have affected the retirement rate is open to several interpretations. For example, judges

[235] The range of years from 1970 to 1979 is omitted for the sake of presentation. A linear best-fit line has been added to demonstrate the trend of the data.

who previously were considering resigning before becoming pension-eligible had an increased incentive not to leave until they were eligible to retire with an improved retirement benefit. Perhaps resignation and retirement rates are inversely proportional, and substantial salary increases have the effect of delaying departures and encouraging retirements rather than resignations.

Based on Tables 10 through 12, it is possible to calculate a precise rate of retirement and thus to test whether the apparently dramatic visual trend in Figure 4 accurately portrays judicial behavior over time. As reflected in Tables 13 through 15, we find that, although the rate of retirement increased over the study period, the increase was modest.

Table 13: Retirement Rate of All Judges by Decade

	Average No. Eligible	Average No. Retired	Rate
1970s	82.8	0.1	0.12%
1980s	212.7	1.3	0.61%
1984–1989	331.8	1.8	0.54%
1990s	452.7	3.8	0.84%
2000s	556.0	4.9	0.88%

Table 14: Retirement Rate of District Judges by Decade

	Average No. Eligible	Average No. Retired	Rate
1970s	51.7	0.1	0.19%
1980s	159.6	0.9	0.56%
1984–1989	251.2	1.3	0.52%
1990s	349.9	2.5	0.71%
2000s	422.8	4.4	1.04%

Table 15: Retirement Rate of Circuit Judges by Decade

	Average No. Eligible	Average No. Retired	Rate
1970s	31.1	0	0
1980s	53.1	0.4	0.75%
1984–1989	80.7	0.5	0.62%
1990s	102.8	1.3	1.26%
2000s	133.4	0.5	0.37%

2. Retirements Delayed

Table 16 presents data on the number of years (or days if less than 365) that all judges, district judges, and circuit judges continued to serve (either in regular active service or in senior status) after becoming eligible to retire before actually retiring.

Table 16: Time Between Eligibility and Retirement

	All Judges	District Judges	Circuit Judges
Minimum	6 days	6 days	8 days
Maximum	22.1 years	16.7 years	22.1 years
Average	4.2 years	4.1 years	4.5 years
Median	2.2 years	2.4 years	1.7 years

These data indicate that judges do not retire at the first opportunity. This observation is borne out by the fact that, as we develop below, most judges who become eligible to retire choose to take senior status first.

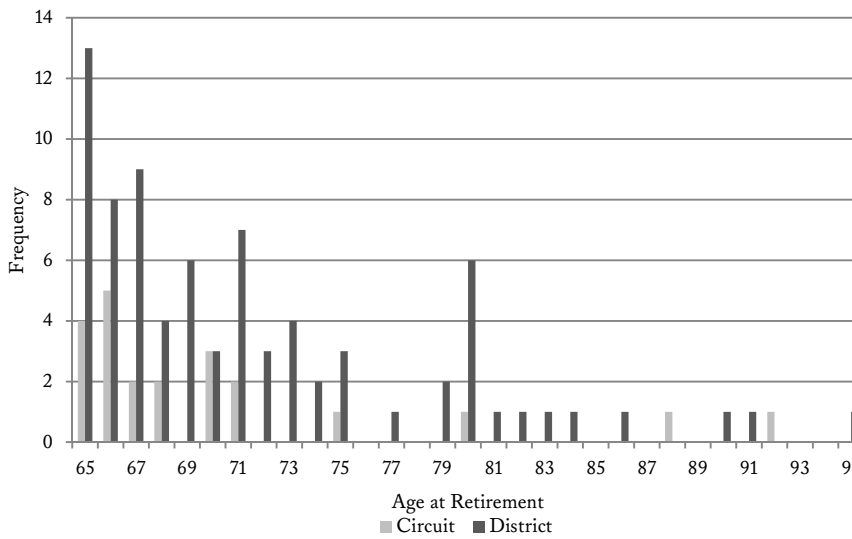
3. Age at Retirement

Looking next at the 101 judges who retired during the years under study, Table 17 presents retirement age data separately for all judges, district judges, and circuit judges. Figure 5 is a histogram of age at retirement.

Table 17: Age at Retirement

	All Judges	District Judges	Circuit Judges
Minimum	65	65	65
Maximum	95	95	92
Average	71	72	70
Median	69	69	67

Figure 5: Histogram, Age at Retirement



C. *What the Historical Record Teaches*

In this part, using the methodology followed in the Van Tassel study, we review and comment on what the historical record tells us about judicial retirements over the years we studied. The preceding part presented and analyzed data on retirement from the database maintained by the Federal Judicial Center. By contrast, the descriptive material in this part is based on public documents, newspapers, and the like.[236]

[236] Electronic databases have made these sources more readily available than was the case when Van Tassel completed her study of resignations.

Analyzing the causal influences on retirements is difficult because judges have rarely offered recorded explanations, and the judiciary has had no exit interview mechanism. As one respondent to our questionnaire observed, "I have been waiting for 12 years for someone in the federal court system to ask me why I left."[237] The handful of occasions when judges have spoken out may or may not be illustrative of larger trends. For instance, several judges noted dissatisfaction with the social isolation of serving as a federal judge, as well as with a perceived diminution of the importance and authority of judges.

Figure 6 illustrates the apparent reasons for judges' retirements. As the figure suggests, most of the judicial retirements in the last forty years can be loosely grouped into two broad categories. The first consists of a minority of judges who retired at an advanced age after many years of service. This category includes not simply the small number of judges who explicitly cited advanced age or health in explaining their retirement, but also many of the judges in the "unknown" category, who retired at the median age of eighty after a median ten years of pension eligibility.[238] This group of judges often retired in their eighties or nineties after as many as twenty years in senior status. Few of these judges took other employment after retirement, and many of them died shortly after leaving the bench.

The second and larger category consists of judges who entered private practice or other private sector employment after retirement (69%, when the categories of inadequate salary, other employment, or dissatisfaction are included). By and large, these judges shared several characteristics. First, they retired relatively young: the median age for judges who entered private practice was 67.5 years. Second, they retired soon after becoming pension-eligible: the median judge in this group waited only one year after eligibility before retiring. Third, although about two-thirds of these judges first assumed senior status (47 of 70), they remained in senior status very briefly. Beyond this, however, it is difficult to generalize about the judges' motivations. Most provided little information about their reasons for retirement, although a handful mentioned inadequate salaries, or the isolation of federal judges, in explaining their motivations.[239]

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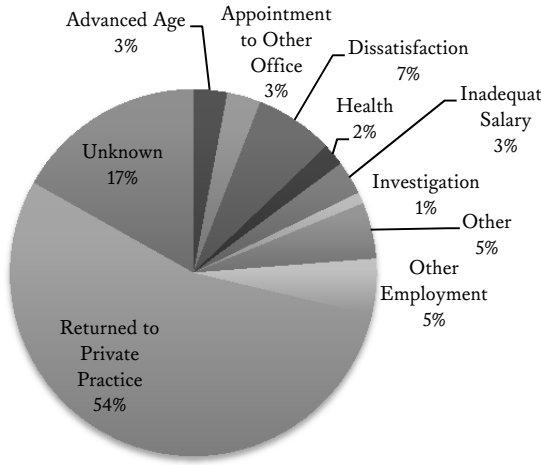
[237] Responses to Sept. 1 Letter, *supra* note 182.

[238] In general, judges rarely provided reasons for retirement. For judges who entered private practice, their subsequent employment history offered evidence of motivation; in the case of judges who probably retired due to old age or health, however, no external evidence could compensate for this lack of data.

[239] For instances when judges reportedly retired because of dissatisfaction, see GEORGE LA PLATA, FROM THE BARRIO TO THE BENCH 218-20 (2008) (describing how Judge La Plata had

Figure 6: Federal Judges' Reasons for Retirement, 1970-2009



The other reasons for retirement were usually idiosyncratic. Three judges retired after relatives were appointed to the same court—retirements needed to avoid the strictures of an anti-nepotism statute.[240] One judge stated that his retirement was motivated by political attacks on him during the 1996 presidential campaign.[241] Two judges retired in protest over the

come to find judging "a bit boring," as well as lonely and isolating); Carol D. Leonnig, *Court Honors Judge Who Laid Down Law; Norma Holloway Johnson Retires from U.S. Bench*, WASH. POST, Jan. 29, 2004, at T4 (reporting that friends stated that Johnson was exhausted from the workload); Haven Tobias, The Common Law of Judge Luther Boyd Eubanks 8-10, *available at* http://www.10thcircuithistory.org/pdfs/Eubanks_bio.pdf (attributing Judge Eubanks's retirement to frustration with merely "counting dispositions" as a result of increasing caseload). For instances when judges complained of an inadequate salary in explaining their retirement decisions, see Bob Egelko, *Federal Judge Retires to Join S.F. Arbitration Firm*, S.F. CHRON., Apr. 21, 2001, at A20 (quoting Judge Legge's statement upon return to private practice that "[o]ur salaries here just don't keep up with our cost of living"); Michael P. Mayko, *Longtime Federal Judge Calls It Quits*, CONN. POST (Bridgeport), Jan. 31, 2009 (recording the complaint of Judge Alan Nevas that "Congress voted themselves a raise this year, but they continue to treat federal judges as if they were second-class citizens. . . . What they are doing is unfair and unrealistic").

240 *See* Donna Walter, *Judge Stephen N. Limbaugh Sr. Will Step Down So Limbaugh Jr. Can Take Seat*, ST. LOUIS DAILY REC. & ST. LOUIS COUNTIAN, June 11, 2008; Mark Binker, *Osteen Jr. to Replace Father in Judgeship*, GREENSBORO NEWS & REC. (N.C.), Sept. 11, 2007, at B1. Retirement was necessary under the revised terms of 28 U.S.C. § 458, which was amended in 1998 after controversy over the appointment of William Fletcher to the same bench on which his mother served. Pub. L. 105-300, § 1(a) (1998), 112 Stat. 2836; *see also* Neil A. Lewis, *Judge Agrees to Step Aside to Aid Her Son*, N.Y. TIMES, May 8, 1996, at B11.

241 After criticism by Bob Dole during the presidential campaign, Judge H. Lee Sarokin stated that "the constant politicization of my tenure has made that lifetime dream [of continued

implementation of the Sentencing Guidelines,[242] while another retired to forestall further investigation of his alleged illegal disclosure of a federal wiretap.[243]

The large majority of judges (73 of 101) assumed senior status prior to retirement. For many of these retiring judges, however, service in senior status was brief: a matter of a year or even a few months prior to retirement, usually followed by work in the private sector. The large number of judges who adopt senior status only briefly before entering the private sector suggests that judges are adopting senior status as a conscious transition to retirement.

From 1970 through 2009, retirements occurred more frequently from some courts than others. Among the district courts, New Jersey, the Central District of California, and the Northern District of Illinois had the highest raw numbers of retirements. Among the circuit courts, there was less variation, but the Fifth Circuit had the highest number of retiring judges. Figures 7 and 8 compare the number of retirements against the numbers of authorized judgeships (as of 2010) in the district and circuit courts, respectively.

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service on the court] impossible for me. The current tactics . . . will affect the independence of the judiciary and the public's confidence in it, without which it cannot survive." Robert Rudolph, *Angry Sarokin Quits Bench, Citing Attacks on His Record*, STAR-LEDGER (Newark, N.J.), June 5, 1996, at 1.

242 Judge John S. Martin wrote an Op-Ed in the New York Times explaining his decision to retire, stating,

> When I became a federal judge, I accepted the fact that I would be paid much less than I could earn in private practice . . . . I believed I would be compensated by the satisfaction of serving the public good—the administration of justice. In recent years, however, this sense has been replaced by the distress I feel at being part of a sentencing system that is unnecessarily cruel and rigid.

John S. Martin, Jr., Op-Ed, *Let Judges Do Their Jobs*, N.Y. TIMES, June 24, 2003, at A31. He then retired rather than continue in senior status. According to his son, Judge Jesse Curtis also cited frustration with the federal sentencing guidelines in his decision to retire. Bob Egelko, *Jesse Curtis Jr.—Judicial Work Was in His Blood*, S.F. CHRON., Aug. 8, 2008, at B5. For the influence of the Sentencing Guidelines on decisions to resign and to assume senior status, see *supra* text accompanying notes 72 & 148.

243 Judge Robert Aguilar was prosecuted for seven years for illegal disclosure of wiretap information, but prosecutors abandoned further judicial proceedings after the Ninth Circuit reversed his conviction and Aguilar retired. Bob Egelko, *Judge Aguilar Retires After Last Charge Dropped*, CONTRA COSTA TIMES (Cal.), June 25, 1996, at A11.

Figure 7: Highest Retirement District Courts, 1970–2009[244]

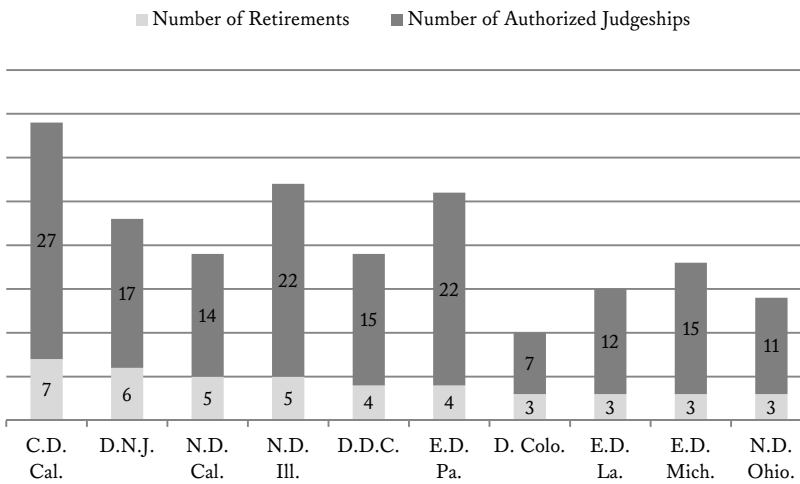
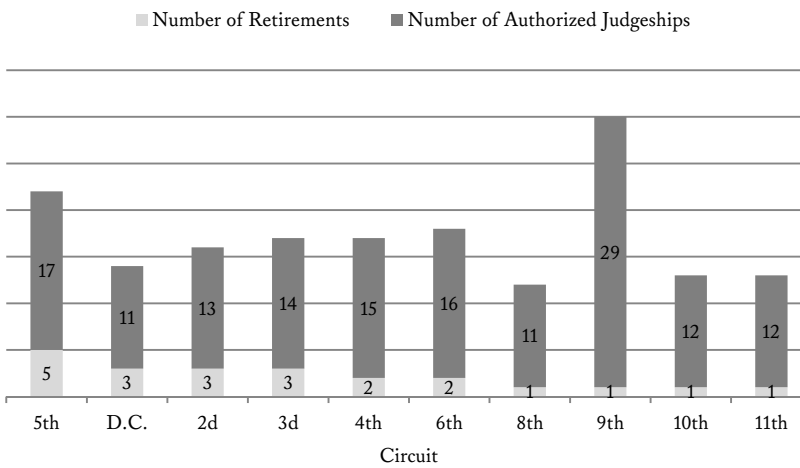


Figure 8: Judicial Retirements by Circuit, 1970–2009[245]



244 *See* U.S. COURTS, *supra* note 113.

245 *See id.* There were no retirements from the First or the Seventh Circuit during the period of study.

Although the retirement rates from some courts seem disproportionately large, some of the absences are just as notable. The Eastern District of New York, for instance, had no retirements from 1970 through 2009, even though it has 15 authorized judgeships (as compared with 17 for New Jersey). These disparities raise the question whether the policies or culture of individual courts concerning judges in senior status have an effect on retirement rates, a question that requires additional research.

One anomaly seems to have at least a partial explanation. The District Court for the District of Columbia and the Court of Appeals for the District of Columbia have comparatively high retirement rates. There may be greater opportunities for these prominent judges to receive appointments to other public offices. Indeed, the three judges appointed to other public office after retirement during the study period all served on one of these courts.[246]

D. *The Questionnaire Survey*

1. Methodology

We distributed a questionnaire to all retired judges we could identify as now living who retired during the period from 1970 through 2009, a group of seventy-two judges. We received responses from 60 of the judges, for a return rate of 83%, which is comparable to the rate of return to our senior status questionnaire. As with that questionnaire, we excluded those returns, of which there were eight, that left substantial portions of the questionnaire unanswered. We thus had 52 substantially complete responses, for an effective response rate of 72%.

Because a judge who is eligible under the Rule of 80 may retire directly from regular active service or choose to serve in senior status and later retire, we divided the pool of survey recipients into two corresponding groups. For those judges who retired without having taken senior status, we asked how, if at all, their decision was affected by health concerns, family concerns, or other personal concerns or interests, such as wanting more time

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246 *See* Douglas Jehl, *Judge on a Return Mission to Politics*, N.Y. TIMES, Aug. 12, 1994, at A15 (recounting Judge Abner Joseph Mikva's appointment as White House Counsel); *Today in Congress*, WASH. POST, Oct. 10, 1985, at A12 (noting the appointment and confirmation of former federal judge Malcolm Wilkey as ambassador to Uruguay); Jerry Zeifman, *War Tribunal Cleans Up Its Act*, WASH. TIMES, Oct. 25, 1999, at 26 (describing Judge Patricia Wald's appointment as Chief Justice of the International Tribunal for the Former Yugoslavia).

to travel or to pursue hobbies or similar such interests. We asked whether the judge no longer found the work interesting or simply wanted new challenges. And we asked whether salary or a felt need for more income was a factor. For the other group of judges—those who took senior status before retiring—we asked both about the factors that influenced the decision first to take senior status and about the factors that influenced the later decision to retire. We used essentially the same inquiries as in our questionnaires for judges currently in senior status and for those who retired directly. This method permitted a considerable amount of cross-comparison.

In addition to these questions directed at influences on a judge's individual decisions, we asked a set of more general questions about background characteristics and post-retirement activity. For those questions requiring scaling, we asked for responses on a scale of one (least or not applicable) to seven (highest). For questions asking for factual data, we offered a menu of choices from which the respondent could choose, including, where appropriate, a choice of "Other" with room for explanation. We invited respondents to add their comments throughout and received a good number.

2. The Results

Forty-nine of the 52 respondents answered the question about race, of whom 41 identified themselves as White, 5 as African-American, 2 as Hispanic, 0 as Asian, and 1 as Other. Forty-eight respondents answered the question about gender, of whom 45 identified themselves as male and 3 as female.

With regard to professional background, we asked about the respondent's principal professional activity prior to judicial service, and also the primary professional activity immediately before appointment to the bench. Forty-nine of the 52 responses gave answers to these questions. Table 18 reports the first; Table 19 the second.[247]

[247] Percentages may not add to 100 due to rounding.

Table 18: Principal Professional Activity Before Appointment

	Overall	District Judges	Circuit Judges
Private Practice of Law	34 (69)%	27	7
Law Practice With a Government Agency	8 (16%)	6	2
Government Service Other than Law	1 (2%)	0	1
Business or Industry	0	0	0
Other	6 (12%)	0	6

Table 19: Primary Activity Immediately Before Appointment

	Overall	District Judges	Circuit Judges
Private Practice of Law	31 (63%)	24	7
Law Practice With a Government Agency	5 (10%)	4	1
Government Service Other than Law	6 (12%)	4	2
Business or Industry	0	0	0
Other	7 (14%)	5	2

As the data indicate, not much changed between these judges' primary professional activities and their activities immediately before assuming the bench. The respondents in the Other category were primarily state court trial judges before appointment to the federal bench.

Comparing this group of judges to the judges in senior status, the majority of both groups were in private practice during their careers and immediately before appointment to the bench. As Table 19 shows, the percentage of retired judges appointed directly from private practice was 63%; for respondents to our senior status questionnaire, the percentage was somewhat lower at 58%.

Turning to the core of the questionnaire, we found that 65.4% of the respondent retired judges (34 of the 52) first took senior status before later retiring. In Table 20 we report on the factors that influenced these judges to make that first decision. The order of presentation is from highest to lowest in overall mean.

Table 20: Taking Senior Status Before Retiring

	Overall Mean	District Court Mean	Circuit Court Mean
I wanted to help the court by creating a vacancy	4.7	4.8	4.6
I intended to retire soon but thought senior status might be a useful transition	2.9	3.1	2.3
I wanted the ability to be selective about my case load	2.9	3.1	2.3
I wanted the tax advantages related to FICA	2.3	2.4	1.9
I wanted the available state or local tax advantages	2.3	2.5	1.6
I wanted the opportunity to sit with other courts	2.2	2.2	2.1
Family concerns made me want a lighter case load	1.5	1.6	1.0
I wanted additional teaching income	1.4	1.2	2.1
Health concerns made me want a lighter case load	1.3	1.4	1.0

What is striking about the table is the sharp drop-off from the mean for helping the court by creating a vacancy (4.7 overall) to the next highest (2.9 overall), tied by those who saw senior status as a transition and those wanting to be selective about their case load.

The perceived importance of creating a vacancy was also apparent in the responses to our senior status questionnaire. As with the senior status questionnaire, we had hypothesized that the mean response of district judges to this proposition in the retired judges' questionnaire would be significantly higher than that of circuit judges, and for the same reasons.[248] Although it was higher, the difference is not statistically significant.

After creating a vacancy, the judges in senior status were most interested in the federal tax advantages of leaving regular active service, whereas the now-retired judges valued most the ability to be more selective about their caseload and the use of senior status as a transition to retirement. Comments provided by respondents suggest that some judges who used senior

248 *See supra* text accompanying note 183.

status as a way station to retirement were thereby seeking to mitigate the consequences of prolonged vacancies for their courts or to clean up their dockets before leaving the bench. Although the desire to earn additional teaching income was stronger among circuit judges than among district judges, unlike the result for the comparable proposition in the senior status questionnaire,[249] the difference is not statistically significant.

Neither the judges now in senior status nor the judges who retired from senior status indicated that health or family concerns were important influences. Although we did not expect it, the difference between the greater salience of family concerns to district judges than to circuit judges among those now retired is statistically significant ($p < .01$).

In comparing these two groups, it is interesting to note that the retired judges gave scaled responses generally lower than the judges in senior status to basically the same questions. We think that this phenomenon may be due in part to the difficulty that judges now retired may have had in reconstructing their decisions to take senior status, coupled with the fact that for many of them senior status was merely a transition.

We asked these judges a series of questions intended to tease out the influences that caused them ultimately to retire from the office. Table 21 reports the results.

Table 21: Retirement After Senior Status

	Overall Mean	Dist. Ct. Mean	Cir. Ct. Mean
I wanted more income	4.8	5.5	1.9
I wanted new challenges	4.2	3.9	5.7
I took senior status intending to retire shortly thereafter	3.0	3.4	1.6
I wanted more free time to pursue personal interests, such as hobbies, travel, etc.	2.7	2.7	2.3
I found I was not being treated as a full Article III judge	2.3	2.4	1.6
I found having to certify my work activity (for purposes of eligibility for a salary increase) demeaning	2.3	2.6	1.0
I found senior status changed my relationships with colleagues in ways I did not like	2.1	2.3	1.6

249 *See supra* text accompanying notes 189-90.

I had family concerns	2.1	2.1	1.9
I had health concerns	1.6	1.8	1.0
I found my office and related facilities no longer satisfactory	1.5	1.6	1.0
I no longer had adequate support staff	1.4	1.5	1.0
I was not able to attract top-flight law clerks	1.1	1.2	1.0
The work of a judge no longer interested me	1.8	1.8	1.6

The desire for more income now becomes the strongest influence overall, clearly for the district judges, but much less so for the circuit judges. We expected that the desire for more income would be a more powerful choice-influencing consideration among district judges, and the difference is statistically significant ($p < .01$). As with the senior status questionnaire, however, we did not find support for our hypothesis that previous professional background, in particular a private practice–dominated pre-judicial career, might affect answers to questions implicating financial concerns. There were no statistically significant differences along this dimension. More income is followed second in strength by a desire for new challenges, but this time more strongly felt by the circuit judges than the district judges.

Among this set of judges, and particularly the district judges, the intention to retire shortly after taking senior status was evident. This is consistent with how the respondents had answered the earlier question about intending to use senior status as a transition to retirement. We did not expect any difference between the district and circuit judges on this question and were thus surprised to learn that the difference in means is statistically significant ($p < .03$). As before, family and health concerns seemed to play a small part in the decision to retire.

Overall, the respondents do not report having been adversely influenced by the policies and practices of their courts regarding support for judges in senior status, such as those related to staff or facilities, or by their ability to attract good law clerks. This finding is consistent with the results of our senior status questionnaire, the responses to which indicated, in general, high satisfaction with staff and support practices.

Although some judges in the retired group reported that they felt they had not been treated as full Article III judges or that their relationships with their colleagues had been adversely affected, these factors were not overall a strong influence on leaving the bench, just as they were not

reported as factors of significant concern by the judges in senior status.[250] The retired judges indicated an interest in more free time to pursue personal interests, while the judges in senior status reported general satisfaction with the free time they had.

Another set of comparisons can be made between the judges who first took senior status and then retired, and the smaller number of judges (18) who retired during these years directly from regular active service. Table 22 lists the propositions we put to this latter group of judges, and their responses.

Table 22: Retirement Directly from Regular Active Service

	Overall Means	Dist. Ct. Means	Cir. Ct. Means
I wanted more income	4.9	5.6	4.0
I wanted new challenges	4.1	3.9	4.3
I wanted more free time to pursue personal interests	2.9	2.7	3.1
I had family concerns	1.8	1.5	2.3
I had health concerns	1.3	1.6	1.0
The work of a judge no longer interested me	1.2	1.3	1.1

Although the small number in this group counsels caution, we note that both district and circuit judges placed more income at the top of their list of concerns. The circuit judges now join the district judges in the salience of the consideration, with a mean score close to the top of their concerns. As we predicted, the difference in aggregate means for this question is statistically significant ($p < .01$). New challenges continue to share second place as an influential factor in the decision to retire. For the judges who retired directly, there is then a distinct drop in scores for the remaining influences, and again health and family concerns score toward the bottom.

There is one consistent noninfluence: lack of interest in the work of a judge does not seem to be a problem that causes judges to retire. A comparison can be made with the responses of judges in senior status as to why they did not retire.[251] These judges reported affirmatively that they liked

250 *See supra* Table 8.
251 *See supra* Table 9.

the judicial work of a judge (the district judges' mean was 6.7, and the circuit judges' mean was 6.4) and that they liked the working conditions of a judge (6.3 and 6.1, respectively). These high mean responses suggest that neither the work nor the working conditions cause the judiciary to lose the services of some of its most experienced personnel.

Returning to the overall cohort of 52 judges, many commented about the effect of Congress's failure to provide a salary increase or annual COLAs on their decision to retire. For some, the failure to keep pace with inflation broke what they regarded as a commitment in connection with the Ethics Reform Act of 1989. For others, it manifested lack of respect for the federal judiciary. For many, whatever congressional policy signaled, it made their situation untenable. One judge simply noted: "I have three teens headed to college."[252] Others expressed frustration or disillusionment, often coupled with regret that financial considerations trumped their career preference. Here is a sample of the comments:

- "Grossly inadequate salary is demeaning and necessitated my retirement. Had judges been fairly compensated I *never* would have retired."[253]
- "If we had been treated fairly by Congress I would have stayed [] in some capacity for a lot less income than I have now!"[254]
- "The time I spent as a federal judge was the best of my professional career. The workload and economics just made no sense."[255]
- "The failure of Congress to grant COLA's was insulting and demeaning."[256]
- "Had Congress kept its promise of $125,000 in constant 1989 dollars, I would still be on the bench."[257]
- "[B]eing a federal district judge was the greatest professional experience of my life. I left it only out of dire economic necessity [related to having children in college and graduate school]."[258]

Notwithstanding generally high levels of satisfaction with the work of federal judges, a few retired judges, primarily circuit judges, expressed

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252 Responses to Sept. 1 Letter, *supra* note 182.
253 *Id.*
254 *Id.*
255 *Id.*
256 *Id.*
257 *Id.*
258 *Id.*

strong dissatisfaction with the perceived ideological direction of their court or the Supreme Court, or with the perceived politicization of the appointments process.[259] Unlike the respondents to the senior status questionnaire, however, not one respondent to the retired judges' questionnaire reported any strategic influence, partisan or otherwise, on the decisions to take senior status or to retire, except to the extent that using senior status as a transition to retirement is so conceived. As suggested by the responses quoted above, lack of candor seems not to be a concern.

We asked the retired judges to whom we sent our questionnaire about the kinds of activities or employment, if any, they engaged in after retirement, and we followed that with a question about their current activity or occupation. Regarding activity after retirement, a whopping 83% (n = 43) reported working at some point and to some extent as an arbitrator, mediator, or in a similar activity for pay. Some of these judges left the bench to work for JAMS (formerly Judicial Arbitration and Mediation Services) or other ADR providers. Thirty-five percent of all respondents (18) went into full-time law practice, and 12% (6) into part-time law practice. Twenty-one percent (11) engaged in volunteer community or public service, and 17% (9) taught. Of the other activities reported—government employment, in-house legal services, full or part-time private sector work other than in the practice of law—each involved three or fewer judges. Three judges reported no significant outside employment.

Finally, we wondered how retired judges felt in retrospect about their decision to leave the bench. Their responses indicated a mean overall satisfaction level of 6.1, with district judges at 6.0 and circuit judges at 6.6. These scores indicate a high degree of satisfaction with the decision to retire. On the basis of our interviews and our overall assessment of the questionnaire returns, we are inclined to credit the judges with a high degree of self-awareness and no propensity to be less than candid.

V. JUDGES IN REGULAR ACTIVE SERVICE

A. *Introduction*

We have considered judges who, when eligible, chose to take senior status and the smaller group that chose to retire. We now consider an even smaller group of judges who, although eligible for senior status or retirement,

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[259] *Id.*

choose instead to remain in regular active service for what would appear to be an indefinite time.

B. *Demographics*

To avoid surveying still-active judges who might be on the verge of taking senior status or retiring altogether, we identified those who remained in regular active service for three or more years after eligibility. Using available databases, we found 63 judges in that group: 30 district judges, 32 circuit judges, and 1 judge on the Court of International Trade. These numbers contrast with the comparable ratios for the judges in senior status and retired judges who received our questionnaires, as well as with the federal judiciary as a whole, in which district judges predominate.

Given the unusual predominance of circuit judges in the study group, in Table 23 we show the number of circuit judges in each circuit who are in the study group and the percentage they constitute of authorized circuit court judgeships; for comparison we also show the number of district judges in each circuit who are in the study group.

Table 23: Percentage of Authorized Circuit Court Judgeships Held by Judges Remaining in Regular Active Service for Three or More Years

Circuit	District Judges	Circuit Judges	Authorized Judgeships (Percentage of Circuit Judges in Group)
First	6	2	6 (33%)
Second	1	2	13 (15%)
Third	1	3	14 (21%)
Fourth	2	1	15 (7%)
Fifth	6	6	17 (35%)
Sixth	1	1	16 (6%)
Seventh	4	4	11 (36%)
Eighth	2	2	11 (18%)
Ninth	4	4	29 (14%)
Tenth	1	2	12 (17%)
Eleventh	2	2	12 (17%)
D.C.	0	1	11 (9%)
Federal Circuit	—	2	12 (17%)

About 18% of judges serving on the circuit courts are judges who have opted to stay in regular active service for three or more years after becoming eligible to leave under the Rule of 80; for district judges that percentage is about 5%. The table reveals three outlier circuit courts that have the highest percentages of judges in the study group, all above 30%: the Seventh, Fifth, and First. The responses to our questionnaire suggest a number of plausible explanations.

From the 63 judges to whom we sent the questionnaire, we received 44 responses. The responding group consisted of 19 district judges and 24 circuit judges, and there was 1 response from a judge of the Court of International Trade. This was a return rate of 70% of the survey group. Of the 44 responses, 41 were substantially complete and constitute our database (65% effective response rate). As with the respondents to the other surveys, not all respondents answered all questions.

Thirty-eight judges identified their race: 36 White and 2 Hispanic; none checked African-American or Asian. Several judges commented about the question itself, even when they did not answer it. One judge who answered the question asked, "Why is this important?"[260] Another expressed the view that "[t]hese questions [referring to race and sex] demean the entire survey and made me skeptical of responding."[261]

Forty judges identified their sex: 33 are male and 7 are female. All but one of the female respondents are circuit judges.

As with the other groups surveyed, we asked these judges about their principal professional activity prior to judicial service and their primary professional activity immediately before appointment to the bench. Table 24 reports on the first; Table 25 reports on the second. In both, the choices are arrayed in descending rank order.

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260 *Id.*

261 *Id.* Like many other people, some judges are reluctant to provide racial identification; indeed, some judges refuse to answer routine requests for such data, for example, statistical inquiries about race concerning interviews for law clerk positions. Survey designers are sensitive to this issue, and this response validates the advice we were given to put these questions last. *See supra* note 179.

Table 24: Principal Professional Activity Prior to Appointment

	Overall	District Judges	Circuit Judges
Private practice of law	26 (67%)	10 (63%)	16 (70%)
Law practice with a government agency	6 (15%)	4 (25%)	2 (9%)
Government service other than practice of law	3 (8%)	2 (13%)	1 (4%)
Business or industry	2 (5%)	0	2 (9%)
Other	2 (5%)	0	2 (9%)

Table 25: Professional Activity Immediately Before Appointment

	Overall	District Judges	Circuit Judges
Private practice of law	26 (67%)	10 (63%)	16 (70%)
Government service other than practice of law	9 (24%)	3 (19%)	5 (25%)
Law practice with a government agency	8 (22%)	5 (31%)	3 (15%)
Business or industry	2 (5%)	1 (6%)	1 (5%)
Other	2 (5%)	0	2 (10%)

Although private practice is the predominant activity in both tables and the principal professional activity for the majority of judges prior to judicial service, other professional activities (combined) increased as primary immediately before appointment. This change was due largely to a shift prior to appointment, mostly among the circuit judges, from private practice into government service, with several serving as state court judges.

C. *The Questionnaire Survey*

1. Regular Active Service vs. Senior Status

Turning to the core of the questionnaire, we asked the judges what influenced them to remain in regular active service rather than take senior status. Table 26 reports their responses in descending order by overall mean.

Table 26: Remaining in Regular Active Service Rather Than Taking Senior Status

	Overall Means	District Judge Means	Circuit Judge Means
I want to participate in en banc hearings	5.6	N/A	5.6
I want to retain the staff/staffing level	5.4	5.7	5.1
I want to keep my chambers	5.3	5.8	4.8
I want to keep a full caseload	5.1	5.0	5.1
I want to keep my own courtroom	4.7	4.7	N/A
I do not want to surrender my seniority for the purposes of presiding, opinion assignment, ceremonial occasions, etc.	4.6	N/A	4.6
I want to participate fully in court or Circuit administration	4.1	4.4	3.8
I want to ensure that I get my fair share of good cases	4.0	4.4	3.6
I am concerned that the bar or the public may view senior judges as not full Article III judges	2.7	2.8	2.3
I am concerned that senior status may adversely affect my relationships with colleagues	2.5	2.4	2.6
I plan to take senior status but am waiting for a different appointing authority (i.e., a different political administration) to nominate my successor	2.5	2.9	2.1
I am concerned about the effect of taking senior status on my ability to attract law clerks	2.5	2.6	2.4
I regard the process of certification (for purposes of eligibility for a salary increase) as distasteful or demeaning	2.2	3.0	1.6

I do not want to surrender my seniority for purposes of ceremonial occasions, etc.	1.8	1.8	N/A

The influences that circuit judges and district judges regard as important for staying in regular active service rather than taking senior status are strikingly parallel and accord with what we expected; the differences relate primarily to their different jobs. Clearly, the most important concerns of both groups relate to keeping their role and place in the judicial hierarchy—a full caseload, staff, chambers. A district judge said, "I enjoy my work and I feel that I do a better job if I devote my full attention to my job. It's difficult enough to keep up with the law as it is."[262]

Sometimes institutional considerations have influenced decisions to remain in regular active service. One district judge said, "It is the culture of my court not to take senior status when eligible (I believe [a number] of my colleagues senior to me are eligible for it but haven't taken it). There is a perception, whether true or not, that one becomes a second-class-citizen at that juncture."[263] Another noted, "I plan to take Senior Status and would do so soon, but there are so many changes coming to our court, and I want to be prepared and staffed to help us through this unsettled period."[264] One judge noted that taking senior status would create an opportunity for an additional judge to be appointed to the court, when an additional judge was not needed;[265] another made the opposite point that taking senior status would, in the current situation, result in that judge not being replaced.[266] A third judge has "waited for [the] vacancy backlog to diminish."[267]

Concerns about a court's current ideology generally or the management of the court under the current chief judge specifically[268] surfaced in the responses to this questionnaire, as they did in the responses to the questionnaire

262 *Id.*

263 *Id.*

264 *Id.* Another respondent, noting that district judges require greater resources than circuit judges, suggested as disincentives to assuming senior status: courtroom sharing, the loss of full court reporter credit even if the judge in senior status carries a full load, and loss of the judge's docket clerk. *See* Letter from a district judge to S. Jay Plager, Circuit Judge, U.S. Court of Appeals for the Fed. Circuit (July 2, 2010) (on file with authors).

265 Responses to Sept. 1 Letter, *supra* note 182.

266 *Id.*

267 *Id.* One recurrent institutional and personal consideration, to which we were also alerted by responses to the senior status questionnaire, was the desire to remain chief judge.

268 *Cf.* Feinberg, *supra* note 162, at 385 ("I do not suggest that a chief judge alone can create such a spirit [of collegiality], although he could undoubtedly substantially impair it.").

sent to judges in senior status. Thus, a circuit judge said, "I want to work full time. In dealing with the current management of my court, it's better to be an active judge."[269] Another circuit judge observed: "My court is a total dysfunctional mess. I hope every day to try and improve things, but everything is partisan—who appointed you—it's sick."[270]

Consistent with perceptions of their role, circuit judges reported being most influenced by the desire to continue participating in en banc hearings. Less influential, but still important to circuit judges, was the opportunity to preside in court and to control opinion assignments. As one judge put it: "It's a fun job! And presiding and assigning cases is important to me."[271] An important concern of the district judges was keeping their own courtrooms.

The circuit judges' concern about en banc participation raises a number of questions. It is certainly true that, in theory at least, one of the major vehicles for creating new or particularly important law at the circuit level is through en banc hearings and subsequent opinions. On the other hand, with one exception, en bancs involve all circuit judges in regular active service,[272] so that any one judge's ability to influence or control a particular outcome is heavily diluted. Participants in en banc arguments held with the full panoply of judges present are aware that the arguments can be hard to focus, and sometimes become more a debate among the judges than a hearing with counsel.[273] For these reasons, among others, some judges routinely resist efforts to have their court take cases en banc, and, anecdotally at least, some judges count among the advantages of senior status that they can avoid involvement in en bancs.

There is another way to think about the issue of en banc participation. Although a judge in senior status who was on the original panel may participate as a member of an en banc court once it is established, the judge may not participate in the vote to take the panel's decision en banc, or be counted as a vote against doing so. To the extent that being able to vote

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269 Responses to Sept. 1 Letter, *supra* note 182.

270 *Id.*

271 *Id.*

272 As authorized by Pub. L. No. 95-486, § 6, 92 Stat. 1629, 1633 (1978), the Ninth Circuit sits en banc with eleven judges, drawn by lot. A judge in senior status who was on the panel "may elect to be eligible to be selected as a member of the en banc court." 9TH CIR. GEN. ORDERS § 5.1.a.4, *available at* http://www.ca9.uscourts.gov/datastore/uploads/rules/general_orders/general_orders11_11.pdf. For a description of the Ninth Circuit's en banc process and its unique use of a judge as en banc coordinator, see Stephen L. Wasby, *"A Watchdog for the Good of the Order": The Ninth Circuit's En Banc Coordinator*, 12 J. APP. PRAC. & PROCESS. 91 (2011).

273 *See* Feinberg, *supra* note 162, at 376-77 ("They consume an enormous amount of time and often do little to clarify the law.").

against taking and overturning a case en banc is important, remaining in regular active service is the only way to preserve that power.

We sought insight on these issues by examining data about the frequency of en bancs in the circuit courts. Table 27 is a snapshot of a decade's worth (2000–2009) of appeals terminated on the merits after en banc review, compared with the number of overall merits terminations and authorized judgeships. The table lists the circuits in order of en banc terminations on the merits, of which there were a total of 623 in the decade, and displays the rankings of the other two factors.[274]

Table 27: En Banc Terminations, 2000–2009

Circuit	En Banc Terminations	Total Merits Terminations	Authorized Judgeships
Ninth	1 (180)	1 (56,386)	1 (29)
Eighth	2 (73)	8 (19,467)	8 (11) (tie)
Fifth.	3 (65)	2 (41,406)	2 (17)
Sixth	4 (59)	5 (25,855)	3 (16)
Eleventh	5 (55)	3 (34,669)	7 (12)
Fourth	6 (47)	4 (26,706)	4 (15)
Tenth	7 (46)	10 (14,946)	7 (12)
Federal	8 (37)	12 (8791)	7 (12)
Third	9 (33)	7 (20,839)	5 (14)
Seventh	10 (26)	9 (15,106)	8 (11) (tie)
First	11 (17)	11 (8808)	9 (6)
D.C.	12 (17)	12 (5519)	8 (11) (tie)
Second	13 (5)	6 (24,552)	6 (13)

Given the high value that circuit judge respondents placed on participation in en bancs, one might think that they dominate in circuit court decisionmaking. As the table shows, that is not the case. Overall, en banc terminations were 0.2% of total merits terminations. On the other hand, these data tell us little about the number of votes for an en banc that failed.

[274] The termination data are derived from Table S-1 in the annual statistics published by the Administrative Office of the United States Courts. *See Judicial Business of the U.S. Courts*, U.S. COURTS, http://www.uscourts.gov/Statistics/JudicialBusiness.aspx (last visited Oct. 11, 2012). For the data concerning authorized judgeships, see U.S. COURTS, *supra* note 113.

As previously noted, the ability to vote against an en banc hearing may be as valuable to a given judge as participation in such a hearing.

It might be expected that the salience of en banc review as a choice-influencing consideration would be reflected in its frequency. The Ninth Circuit, using its own special en banc procedure, far outnumbers the other circuits in en bancs, as it does in total terminations overall. By contrast, there were no en banc reviews in the Second Circuit in eight of the ten years between 2000 and 2009. If a circuit court has a culture of judges promptly assuming senior status (as opposed to remaining in regular active service)—as the Second Circuit does (or did)—it may be linked to a culture of discouraging en banc review.[275] In the Federal Circuit, the total of 37 en banc terminations for the decade was skewed by one year (2000) when there were 14.

The frequency of en banc review may also reflect the risk of inconsistent decisions that is attributable to the size of the circuit or to ideological divisions. As to size, the Ninth Circuit was responsible for almost 30% of all en banc terminations during the decade. As to ideological divisions, which may independently impart salience to en banc review, a recently published study of the Ninth Circuit's en banc process observes that in the mid-1970s "calls to rehear cases en banc often resulted from other judges' unhappiness at decisions by the two most liberal judges, Walter Ely and Shirley Hufstedler, or from Judge Hufstedler as to rulings by the court's more conservative majority."[276] In a similar vein, a December 2008 article in *The Washington Post* reported that Republican appointees to the Sixth Circuit "have repeatedly organized full-court rehearings [en banc review] to overturn rulings by panels dominated by Democratic appointees."[277]

2. Regular Active Service vs. Retirement

We turn to the considerations that influence judges in regular active service to remain on the bench rather than retire altogether. Table 28 presents these data.

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275 *See supra* text accompanying note 185.

276 Wasby, *supra* note 272, at 96.

277 R. Jeffrey Smith, *The Politics of the Federal Bench: GOP-Appointed Majorities Winning Ideological Battles at Appellate Level*, WASH. POST, Dec. 8, 2008, at A1. *See generally* Christopher P. Banks, *The Politics of En Banc Review in the "Mini-Supreme Court,"* 13 J. L. & POL. 377 (1997).

Table 28: Reasons for Remaining in Regular Active Service Rather Than Retiring From Office

	Overall	District Judges	Circuit Judges
I like the judicial work of a judge	6.6	6.8	6.3
I like the working conditions of a judge	5.9	6.1	5.7
I view this as a lifetime position (or until I am unable to fulfill the duties of a judge)	5.7	5.9	5.6
I like my colleagues	5.3	5.5	5.1
I am not interested in the typical professional activities of retired judges	4.3	3.7	4.8
I enjoy the respect shown to a judge	4.2	4.8	3.5
I do not know what I would do if I retired from judicial office	3.9[278]	4.1	4.0
I like the administrative work of a judge	3.4	4.1	2.8
I intend to retire but am waiting for a different appointing authority (i.e., a different political administration) to nominate my successor	1.9	2.6	1.5

These data can be compared with the responses of judges in senior status to the question why they remained in senior status rather than retire.[279] We put the same eight propositions to both groups of judges, adding for the judges in regular active service a proposition concerning strategic partisan retirement. These eight propositions are the first eight listed in Table 28; strategic partisan motivation had the least influence and appears in the ranking at the bottom of the table.

Although the strength of the responses to these propositions is not identical for the two groups, and thus their order in the two tables differs, the

[278] This apparent anomaly results from including a response in the "Overall" mean—from a judge of the Court of International Trade—that is not included in the other means.

[279] *See supra* Table 9.

respondents to the two questionnaires agreed on the most important influence—the overall mean for "I like the judicial work of a judge" turned out to be the same, 6.6, for both the judges in regular active service and the judges in senior status. In both sets of responses district judges accorded this influence slightly greater strength than circuit judges.

Both groups then ranked the next three possible influences more or less together: liking the working conditions of a judge, viewing judging as a lifetime position, and liking their colleagues, although not in exactly the same order. Interestingly, as Table 28 shows, for judges in regular active service the overall means for these next three influences drop noticeably from the most important, with none gaining a 6.0 or above. This finding contrasts with the responses of the judges in senior status, who gave all three of these influences overall means above 6.0. Among possible influences not listed, one judge wryly noted that he was "waiting for the ignored salary increase" to retire.[280]

As with respondents to our senior status questionnaire, we hypothesized that the greater degree of autonomy that district judges enjoy in their judicial and administrative work would lead to greater satisfaction with that work. Whereas the differences in means as to both of the pertinent propositions are statistically significant for judges in senior status, for the judges remaining in regular active service they only approach statistical significance ($p = .06$, $p = .07$). We also again predicted that the nature and frequency of district judges' interactions with colleagues, the bar, litigants, and the public would yield higher means for propositions probing collegial relationships and professional respect. The differences in means as to both are statistically significant for judges in senior status. Although the same is true for judges remaining in regular active service as to enjoying professional respect ($p = .05$), there was no significant difference as to collegial relationships.

After these four possible influences, there is a noticeable drop in the strength of the remainder in both sets of responses. Neither group thought that the continued opportunity to do administrative work was a reason not to retire, and both groups were somewhat mixed about whether they would know what to do if they retired (both reported an overall mean of 3.9). As one of the district judges commented, "I simply do not know anything to do outside of a courtroom."[281]

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280 Responses to Sept. 1 Letter, *supra* note 182. Another judge observed that "a retired judge does not receive COLAs, if any." *Id.*

281 *Id.*

Consistent with our other findings with respect to strategic partisan retirement, the judges in regular active service gave that consideration their lowest overall mean score, although, contrary to what we expected, the district judges seemed to think it a stronger influence, and the difference in means approaches statistical significance ($p = .06$). Interestingly, among these respondents strategic partisan considerations appear to play a larger, even if still small, influence in decisions about taking senior status (overall mean 2.5) than in decisions about retiring (1.9). Such considerations seemed to have had a greater salience for judges appointed by Republican presidents, and the differences in means for the pertinent questions as to both senior status and retirement were statistically significant ($p = .05$, $p = .03$). In a contrary sense, as some of the comments noted previously illustrate, politics—defined in terms of internal disputes within a court, whether the result of personal or political differences—were among the influences that keep some of these judges in regular active service.

Finally, we also asked, "In general, how satisfied are you with your decision to remain in regular active service?" The overall mean response was 6.5, with a mean of 6.7 for district judges and 6.3 for circuit judges. These numbers are very close to the mean responses to the comparable question we posed to judges in senior status, which were 6.5 for district court judges and 6.4 for circuit judges.

VI. POLICY IMPLICATIONS

A. *Resignation*

When service until death was the primary way a federal judge without independent means could have a measure of financial security, the alternative of resignation appealed to some for whom that prospect proved unacceptable, or for whom a relatively cloistered life of public service was itself a reason to resign.[282] The advent of retirement from the office, senior status, and disability retirement have fundamentally changed the landscape in which decisions to resign are made. Particularly after Congress instituted the Rule of 80 in 1984 and made it applicable to retirement as well as service in senior status, most federal judges, whose average age at appointment has remained stable at around age fifty, simply have had too much to

[282] *See* Van Tassel, *Resignations and Removals*, *supra* note 6, at 346-47, 408-10 (providing reasons for resignations from 1790 to 1869).

lose by resigning. Thus, the fact that resignation rates in the period of our study have been at historic lows was to be expected.

This perspective also illuminates two of our other findings about resignations. First, we should not be surprised that some who are committed to a life of public service find the call to other positions in that service adequate reason to resign, particularly if the call comes from the President or if it involves changing one role for another at greater salary.[283] Second, the younger federal judges are when they regret their decision to accept the financial sacrifices of their office or the "relatively cloistered life of public service" it entails, the more empowered to change careers they are likely to feel. The phenomenon is akin to that affecting decisions to retire, or likely to affect them in the future, which we discuss below. We believe it helps to explain our finding that federal judges appointed at younger than average ages are more likely to resign.[284]

Some scholars believe that younger appointments are a means by which a president may try to ensure the enduring influence of a judicial appointment agenda, particularly if it is a policy agenda. Whatever the effectiveness of such a strategy for Supreme Court appointments,[285] which entail a very different incentive structure, our findings about resignations and the concerns our data elicit about retirements suggest that it may not be effective for other Article III appointments. To be sure, resignations are not a big enough feature of the present landscape to warrant a change in presidential appointment strategy, and we doubt they ever will. To the extent that financial considerations drive resignations today—our data indicate that they play a larger role than in the past[286]—and in the absence of a change in congressional compensation policy and practices, we tend to agree with those who identify as the primary concern their effect on the pool of those who aspire to federal judicial service.[287] The same may not be true of retirements.

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283 *See supra* text accompanying note 69.

284 *See supra* text accompanying note 84.

285 *See* Stephen B. Burbank. *Alternative Career Resolution II*: *Changing the Tenure of Supreme Court Justices*, 154 U. PA. L. REV. 1511, 1515-16 (2006) (finding little empirical support for use of such a strategy in appointments to the Supreme Court).

286 *See supra* text accompanying notes 75 & 82.

287 *See supra* note 154.

B. *Retirement*

Responses to our questionnaire revealed that the two most important influences on retirement, whether or not preceded by senior status, are the desire for more income and the desire for new challenges.[288] Both should be sensitive to length of service, and one of them may also be sensitive to age at appointment. The longer a federal judge and that judge's family must make the sacrifices required, the more powerful the desire to change careers is likely to be, at least in some areas of the country (with high costs of living) and for some families (because of compensation policy and practices like those of the last twenty years). Moreover, a judge appointed at forty must serve for twenty-five years to assume senior status or retire, compared with fifteen years for a judge appointed at the average age. We deem the former more likely than the latter to desire new challenges at age sixty-five.

Given only a small increase in the rate of retirement over the four decades of our study,[289] why worry? First, the responses to both the retired and senior status questionnaires reveal widespread unhappiness about compensation policy and practices, and about the attitudes of members of Congress they are deemed to reflect. These feelings may be eroding the institutional loyalty and commitment to public service that are also evident in those responses. Indeed, a number of respondents to the senior status questionnaire told us that they were considering retirement, while others made it clear that they would have retired had they known what the compensation policy and practices would be when they chose senior status.

Second, the compensation policy and practices of the past two decades have substantially reduced the financial advantages that senior status once enjoyed over retirement. Third, and perhaps most important, whether the source of an eligible federal judge's consideration of retirement is financial distress, accumulated frustration about lack of respect from Congress, the desire for new challenges, or some more idiosyncratic reason, that judge is making the decision in a world that in at least two pertinent respects is not the world that existed a generation ago.

"Our sixty-five is not our parents' sixty-five" is more than wishful thinking; it is a well-documented fact. We are living longer, healthier lives and are less afflicted by disability at older ages than previous generations.[290] Numerous studies indicate declining rates of functional and cognitive

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288 *See supra* Tables 21 & 22.

289 *See supra* Table 13.

290 *See* WAN HE ET AL., *supra* note 61, at 1.

limitations, including a downward trend in disability since the early 1980s.[291] Another study found that "workers age 60 and older are half as likely as their nonworking counterparts to report that they are in fair to poor health. They are also almost two times more likely to report that they are in very good to excellent health."[292]

With the lowering of the eligibility age to sixty-five (assuming fifteen years of service) in 1984, and the continued progress in health and health-care over the last thirty years, most federal judges who were appointed at the average age have better reason to think that they are up to the challenges of a new career than their predecessors. In addition, the new career that most retired federal judges seem to favor—ADR—essentially did not exist thirty years ago. Without it, the changes in the legal profession that led one judge we interviewed to observe that "many sixty-five year old lawyers are depressed"[293] might deter a move driven by the desire for new challenges, if not one driven by the desire for more income. Even in a firm, however, specializing in ADR permits a retired judge to continue using the skills and experience of a judge and presumably relieves some of the rainmaking pressure that causes many lawyers to lament the course of the profession. There may be no need to take that risk, however. By joining an ADR provider, federal judges with the right experience can avoid law firm pressures and law firm culture, work as much or as little as they wish, and earn multiples of their judicial salary.[294]

For these reasons, we are concerned that increasing numbers of federal judges, at an increasing rate, will choose to retire upon becoming eligible or soon thereafter, many of them after a short transitional period in senior status. Indeed, retirements over the last two years (our study period ended in 2009) suggest that the rate is increasing, perhaps substantially.[295] Were

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[291] *Id.* at 60.

[292] *Id.* at 91 (quoting Kristen Kilker & Laura Summers, *Who Are Young Retirees and Older Workers?*, DATA PROFILES: YOUNG RETIREES AND OLDER WORKERS (Nat'l Acad. Aging Soc'y), June 2000, at 3, *available at* http://www.agingsociety.org/agingsociety/pdf/aarp1.pdf).

[293] *See supra* text accompanying note 231.

[294] The information in this sentence is based on a confidential interview with an officer of one large ADR provider. That individual told us that not all federal judges who apply are accepted and that the provider is looking for certain types of expertise or experience, such as complex litigation or patent litigation. Such criteria may help to explain why retirements from the district courts are not evenly distributed, with disproportionate levels in the District of New Jersey, the Northern District of Illinois, and the Central District of California. *See supra* Figure 7.

[295] In 2010 and 2011, a total of 18 judges retired (8 in 2010 and 10 in 2011). This does not include a judge of the United States Court of Appeals for the Federal Circuit who retired in 2010. *See Biographical Directory of Federal Judges*, *supra* note 54. Using the average annual number of eligible judges from the 2000s (556), which is surely somewhat low, the retirement rate for those

that to occur, the country would lose the benefits of the work, experience, and wisdom these judges could provide, either by continuing in regular active service or assuming and remaining in senior status.

If, as we fear, the rate of retirement is likely to increase; if, as we expect, Congress and the Executive have little appetite to increase substantially the number of authorized judgeships; and if, as we believe our data confirm, service in senior status is both essential to the functioning of the federal judiciary and justified in cost-benefit terms quite apart from the appetites of the political branches, the country should pursue policies and fashion institutional arrangements that are designed to prevent retirements from subverting senior status.

One possible structural step would be to return to the system of different age and service requirements for senior status and retirement, by keeping the Rule of 80 for the former and returning to the rule that governed retirement from 1869 until 1984 (age seventy and ten years of service). Certainly, very little thought seems to have gone into the congressional decision in 1984 to equate the requirements.[296]

There are, however, serious potential problems associated with that step. The concerns include, from an institutional perspective, whether delaying eligibility to retire might make it harder to recruit good candidates to serve as federal judges, particularly when eligibility for a pension annuity is an all-or-nothing proposition.

We do not see a compelling normative argument against such a change from the perspective of individual judges, except on behalf of those who accepted appointment under the current system. With or without the exception, however, delaying eligibility could only further erode the morale of the federal judiciary, with costs not easily estimable. Moreover, even if not compelling, an argument against reversion to the pre-1984 regime that viewed the economic opportunities of retirement as a form of delayed compensation, mitigating if not justifying inadequate compensation for regular active service, is both predictable and understandable.

Of course, when the policy goal is to prevent retirements from subverting senior status, the most obvious step is to address the problems that most

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two years would be 1.62%, compared to the 2000s average of 0.88% (Table 13). In absolute terms, whereas an average of 4.9 judges retired annually in the 2000s, the average over the past two years is 9.

296 *See supra* note 90 and accompanying text.

directly create that risk.[297] A good deal of evidence suggests that, still today, most federal judges believe that theirs should be a lifetime position, and that the erosion we see is due to a combination of financial hardship (for some) and frustration that hard work under restrictions unique to the judiciary is not valued (for many). As one judge we interviewed observed, "In a substantial case involving the government, the judge is likely to be the lowest paid lawyer in the courtroom."

Congress could stop the erosion by relieving the hardship and demonstrating the respect that is due a separate and independent branch of government and the appreciation that is due federal judges, most of whom work hard for what is widely considered to be inadequate compensation. Understanding that today's Congress may be in no mood to take such advice on faith, we turn to the role that senior status plays in today's landscape, and to its benefits and costs.

C. *Senior Status*

This is a story of institutional evolution and adaptation. The federal judiciary has changed dramatically since the Founding. Scholars may debate whether the resources available to accomplish the work of the federal judiciary have declined since 1970.[298] There can be no question, however, that the volume of the work, judicial and administrative, has increased substantially and that the only human resource envisioned by the Founders for accomplishing it—Article III judges in regular active service—has played a diminishing role.

The architects of service in senior status could not have contemplated that judges in senior status would do a great deal of work, as there apparently was no thought that they would have chambers, staff or, in the case of

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[297] In thinking about ways to diminish the appeal of retirement, we considered a policy of appointing older individuals, which might well have a number of benefits but does not seem achievable (or, unless legislated, enforceable). We also note a recent article advocating a prohibition against practice by federal judges who have resigned or retired. *See* Mary L. Clark, *Judicial Retirement and Return to Practice*, 60 CATH. U. L. REV. 841 (2011). Two aspects of the proposal that we deem problematic are the fact that it is predicated on "guaranteeing retired judges regular pension increases," *id.* at 904, and would not extend to "service as a neutral arbitrator or mediator." *Id.* at 900.

[298] *See* Stephen B. Burbank, Sean Farhang & Herbert M. Kritzer, *Private Enforcement of Statutory and Administrative Law in the United States (and Other Common Law Countries)* 19-21 (U. Pa. L. Sch., Pub. Law Research Paper No. 11-08, 2011), *available at* http//ssrn.com/abstract=1781047 (noting doubts about underfunding expressed by some scholars but elaborating reasons why reliance on docket statistics is inadequate).

district judges in senior status, a courtroom.[299] Rather, it appears that the proponents of senior status, both in the judiciary and in Congress, imagined a corps of experienced judges who could help in the event of emergencies. Moreover, that view of senior status appears to have endured for decades. For instance, recall the 1944 anecdote about judges in senior status showing up in courtrooms when not needed.[300] Presumably those courtrooms were assigned to judges in regular active service.

The situation must have changed shortly thereafter, and with it attitudes toward the role and value of judges in senior status. We draw this inference from 1948 legislation favoring senior judges over retired judges by according them the salary of the judicial office.[301] Moreover, it is an inescapable inference from the 1950 action of the Judicial Conference authorizing the circuits to provide judges in senior status with chambers and staff in return for "substantial judicial work,"[302] the 1954 legislation decoupling the age and service requirements for senior status from those for retirement,[303] and the explanation given in support of the 1958 legislation that changed the designation from "retired judge" to "senior judge."[304] As far back as 1959, Chief Justice Warren told the members of the American Law Institute that "[i]f it were not for many of the [judges in senior status] who continue to serve so faithfully, we would indeed be in a terrible condition."[305] In 1986, Chief Justice Burger, in stressing the wisdom and experience of judges in senior status, seems to have assumed that Congress understood that.[306]

In 1984, Wilfred Feinberg, then the chief judge of the Second Circuit, observed that judges in senior status "are a precious resource whose welfare and health must be every chief judge's concern."[307] Today, however, the institutional perspective on service in senior status has all but obscured the individual perspective. Perhaps, given our findings, that is no surprise. Judges in senior status have constituted an increasing percentage of Article

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299 *See supra* text accompanying notes 165-67.

300 *See supra* text accompanying note 94.

301 *See* Act of June 25, 1948, ch. 646, §§ 294, 371, 372, 62 Stat. 869, 901, 903-4; *supra* text accompanying note 38.

302 *See* REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, *supra* note 168, at 21-22; *supra* text accompanying note 168.

303 *See* Act of February 10, 1954, Pub. L. No. 294, § 4, 68 Stat. 8, 12-13; *supra* text accompanying note 39.

304 *See* H.R. REP. NO. 85-171, at 4 (1957); *supra* text accompanying note 216.

305 Earl A. Warren, Chief Justice, Address Before the American Law Institute (May 20, 1959), *in* 36 A.L.I. PROC. 27, 41 (1959).

306 *See supra* text accompanying note 133.

307 Feinberg, *supra* note 162, at 375.

III judges since the 1980s, and they have performed an increasingly large share of the judicial work of the district courts and courts of appeals, at the same time easing the administrative burdens of judges in regular active service.

When Congress was considering changes in the arrangements for service in senior status in 1989, a representative of the federal judiciary estimated that it would require 80 additional judges in regular active service to perform the case work then done by judges in senior status.[308] As part of the research for this study, we sought to bring that estimate up to date as of 2009.[309]

For the district courts, there were 678 authorized judgeships (including temporary judgeships) and 651 judges in regular active service in December 2009. The latter accounted for 78.8% of case terminations in 2009, while judges in senior status accounted for the other 21.2% (including 26.8% of all trials). It would require 174 district judges in regular active service to do the case work performed by judges in senior status in that year. Taking vacancies into account, this translates into 147 additional authorized district court judgeships.

For the regional courts of appeals, there were 167 authorized judgeships and 156 judges in regular active service in December 2009.[310] Judges in regular active service accounted for 82.2% of appeals participations in 2009, while judges in senior status accounted for 17.8%. It would require 34 additional circuit judges in regular active service to do the case work performed by circuit judges in senior status in 2009. Taking vacancies into account, this workload translates into 23 additional authorized circuit judgeships.

Unless members of Congress (and some judges) were to change their attitudes toward the creation of additional federal judgeships, without a large corps of judges in senior status, the federal judiciary would collapse under the weight of its caseload. Put differently, whether or not members of

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[308] *See Judicial Independence—Discipline and Conduct: Hearings on H.R. 1620, H.R. 1930, and H.R. 2181 Before the Subcomm. on Courts, Intellectual Property, and the Administration of Justice of the H. Comm. on the Judiciary*, 101st Cong. 28 (1989) (statement of Frank M. Coffin, Senior J., U.S. Court of Appeals for the First Circuit).

[309] We are indebted to the late Steven Schlesinger and his colleagues in the Statistics Division of the Administrative Office of the United States Courts for assistance in calculating these estimates. Note that because the appellate caseload data for judges in senior status includes only the regional courts of appeals, so do the data we use on authorized judgeships.

[310] *See Judicial Facts and Figures 2009 tbl.2.1*, U.S. COURTS, http://www.uscourts.gov/Statistics/JudicialFactsAndFigures/JudicialFactsAndFigures2009.aspx (last visited Oct. 11, 2012). This total includes all circuit courts except the Federal Circuit.

Congress will admit it, they are relying on judges in senior status to take them off the hook for not authorizing an adequate number of judgeships. This perspective has led some to criticize senior status.[311]

If Congress did not (or could not) rely on judges in senior status, the "efficiencies" that long ago elicited the concern of Judge Newman (and many others),[312] and the bureaucratic turn to Article III surrogates that long ago elicited the concern of Judge Posner (and many others),[313] would seem like near-perfect justice; civil trials would move from an endangered species to the verge of extinction, and representatives of the United States would have to stop lecturing abroad about the importance of courts to the Rule of Law, since access to the federal court system would be effectively a privilege of the wealthy.

Indeed, if judges currently serving in senior status uniformly reduced their workload to 25% (but no further, in order to remain eligible for salary increases), the federal court system would be in very serious distress. Compared to judges in regular active service, on average district judges in senior status currently carry a workload of at least 50.3%, while circuit judges in senior status carry a workload of at least 45.1%—in other words, double or almost double the workload that Congress deemed sufficient to warrant eligibility for salary increases in 1989.[314]

Moreover, apart from conducting 26.8% of all trials in 2009, judges in senior status were the workhorses of the intercircuit assignment system, never more important than today to the efficient resolution of docket crises, and central to the flexibility envisioned in the federal judiciary's 2010 Strategic Plan.[315] Finally, district judges in senior status, who are particularly likely to have the experience and availability sought by the MDL panel, currently oversee 26.5% of the MDL dockets.[316] Any substantial decrease in their availability for that service would again (as with intercircuit assignments) strike hard at the federal judiciary's ability to respond effectively to

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311 *See* Kelly J. Baker, Note, *Senior Judges: Valuable Resources, Partisan Strategists, or Self-Interested Maximizers?*, 16 J.L. & POL. 139, 145 (2000) (discussing the criticism that senior status permits Congress to avoid politically difficult choices).

312 *See supra* text accompanying note 108.

313 *See supra* text accompanying note 101.

314 Ethics Reform Act of 1989, Pub. L. No. 101-194, § 705, 103 Stat. 1716, 1770. In all circuits, maintaining a 25% caseload is also sufficient to entitle the judges in senior status to chambers and some staff.

315 *See* STRATEGIC PLAN, *supra* note 223, at 8; *supra* text accompanying note 122.

316 *See supra* text accompanying note 123.

the vagaries of the federal court docket, which for this purpose should be viewed from a national—not a local or regional—perspective.

The value of the service provided by judges in senior status is hardly news. Since Judge Feinberg's encomium, the Federal Courts Study Committee cautioned that "[e]ffective federal court operations require maintaining the incentives that the current senior judge system affords."[317] The 1995 Long Range Plan for the Federal Courts observed that judges in senior status "provide an invaluable resource to the federal courts" and "should be treated with the respect and consideration befitting their experience and dedication to the law."[318] Noting what it called "a new and alarming trend for federal judges to leave the bench entirely when they reach retirement eligibility, rather than take senior status," the plan argued that "[s]enior judges should suffer no discrimination upon assuming that status," and that a "fair, responsive policy for utilizing this invaluable resource will deter" judges from remaining in regular active service beyond their time or "simply leav[ing] the bench altogether," because of the fear of prejudicial policies.[319] Having listed some indications "that the treatment of senior judges often ignores their important contributions," the plan observed that "[i]n all these situations, senior judges should be treated, if practicable, as though they were active judges with the same seniority."[320]

Against this backdrop, the discussion of senior status in the federal judiciary's 2010 Strategic Plan seems tepid. To be sure, one strategy is to "[s]upport a lifetime of service for federal judges," and one of its goals is to "[s]trengthen policies that encourage senior Article III judges to continue handling cases as long as they are willing and able," while another goal is to "[s]eek the views of judges on practices that support their development, retention and morale."[321] Perhaps the difference in tone merely reflects differences between a long-range plan and a strategic plan. Moreover, some of the specific recommendations concerning judges in senior status in the 1995 Long Range Plan had already been adopted.[322] We believe, however, that there is something else operating here, to wit, the cost-cutting pressures

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317 REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 154 (1990).

318 LONG RANGE PLAN, *supra* note 223, at 84.

319 *Id.* at 100-01.

320 *Id.* at 101.

321 STRATEGIC PLAN, *supra* note 223, at 9.

322 Thus, as recommended in the 1995 Long Range Plan, *see supra* text accompanying notes 318-20, judges in senior status are now eligible to serve on the Judicial Conference, circuit judicial councils, and the Board of the Federal Judicial Center, *see* 28 U.S.C. §§ 331, 332(a)(3), 621(a)(2) (2006).

from Congress that drove the 2010 Strategic Plan's discussion of achieving "the effective and efficient management of public resources,"[323] and that led to a September 2011 "cost-containment 'summit' of chairs of Judicial Conference committees and members of the [Conference's] Budget Committee and the Executive Committee."[324]

It remains true today, as envisioned in 1919 and again in 1944, that from an individual perspective, any work done by judges in senior status is work done for nothing (since they are entitled to the office and undiminished compensation for life whether or not they do any work).[325] Once the federal judiciary started to rely on judges in senior status to do "substantial judicial work," however, the provision of chambers and staff meant that the original assumption that the work of judges in senior status would also be costless from an institutional perspective no longer held true. In the current budgetary climate, avoiding measures that would cause substantial numbers of federal judges to prefer retirement or continued regular active service to senior status may require that Congress (and perhaps some members of the federal judiciary) be persuaded that, from an institutional perspective, judges in senior status are cost-effective.

In order to determine whether that is true, we also requested from the AO data on the cost of federal judgeships.[326] Accepting their accuracy, we calculated the annual recurring cost of supporting the actual number of judges that would be required to do the case work performed in 2009 by judges in senior status (assuming no salary increases or COLAs). At the district court level (174 judges), the cost would be approximately

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323 STRATEGIC PLAN, *supra* note 223, at 8; *see also id.* ("Cost containment remains a high priority, and new initiatives to contain cost growth are under consideration.").

324 *Hard Choices and Difficult Issues: The Judiciary Considers Its Financial Future*, THIRD BRANCH (Admin. Office of the U.S. Courts), Oct. 2011, at 1.

325 It is widely, but erroneously, asserted that a judge must carry a 25% workload in order to remain in senior status. *See, e.g.*, Collins, *supra* note 107, at 28 (citing Stras & Scott, *supra* note 217, at 470); Yoon, *supra* note 152, at 515; Stephen J. Choi et al., *The Law and Policy of Judicial Retirement* 3 (N.Y. Univ. L. & Econ. Research Paper No. 11-12, 2011), *available at* http://ssrn.com/abstract=1792422.

Alas, even the Congressional Research Service has misunderstood the effects of the Ethics Reform Act of 1989, repeating the myth that "[e]ach year, senior status judges must handle the equivalent of 25% of the caseload of an active judge or serve the federal judiciary in an administrative capacity." RUTKUS, *supra* note 129, at 11. The requirement in question pertains exclusively to salary increases.

326 *See* Cost of Establishing a New Judgeship—Fiscal Year 2013 (May 23, 2011) (on file with authors). Data on the costs of regular active judgeships (as estimated at that time) had previously been provided to Congress. *See, e.g.*, S. REP. NO. 110-427, at 17 (2008) (supplemental and minority views).

$175,872,000. At the court of appeals level (34 judges), it would be approximately $32,057,000. The total annual recurring cost would be approximately $207,929,000.

Although the AO also provided us with cost data for the positions held by judges in senior status, they set at zero the costs for space and facilities and security.[327] We have thus far been unsuccessful in securing an understandable explanation for zeroing out those costs. Let us assume, at the other extreme, that the space and facilities and security costs of judges in senior status with chambers and staff are identical to those of judges in regular active service. If that were true, the total annual recurring cost of the 77 circuit and 279 district court judges so situated in September 2009 would be approximately $226,737,000 (not including the salaries and benefits of the judges, which must be paid in any event), or approximately $19,000,000 more than the cost of the judges in regular active service needed to do an equivalent amount of case work.

If, however, we hold the space and facilities costs constant but accept the security cost as zero on the theory that judges in senior status are not in fact adding to the expense that would have to be incurred to protect judges in regular active service (an argument that is harder to accept as to space and facilities), the total annual recurring cost of judges in senior status (again excluding salary and benefits) would be approximately $193,919,000. This is approximately $13,000,000 less than the cost of the judges in regular active service who would be required to do the case work currently performed by judges in senior status.

Of course, these estimates are based on other estimates, and the process involves numerous assumptions, some of which are contestable. Moreover, this replacement cost analysis does not account for the contributions that judges in senior status make to the administration of their own courts, their circuits, and the institutional federal judiciary. That those contributions have nontrivial value is suggested by the recognition that administrative work qualifies for eligibility for salary increases.[328] Indeed, even within the domain of case work, the analysis does not account for the special value that visiting judges serving in senior status bring to the management of caseload backlogs caused by vacancies, periodic surges in cases, or other phenomena, and to the increasingly important MDL process. Securing equivalent

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[327] *See* Cost of Establishing a New Judgeship—Fiscal Year 2013 (May 19, 2011) (on file with authors). Both sets of data provided by the AO include costs for staff ("supporting personnel") that are based on historical experience.

[328] *See* 28 U.S.C. § 371(e)(1)(D) (2006); *supra* text accompanying notes 43-44.

flexibility exclusively from a corps of judges in regular active service probably would require more of them, perhaps many more, than the simple calculation presented above suggests.

Whether the focus is casework or administrative work, as Chief Justice Burger stressed in 1986,[329] the contributions of judges in senior status are not merely quantitative, substituting for work that would otherwise have to be done by judges in regular active service. Wisdom and experience are hard to quantify, but they are hardly irrelevant to a notion of efficiency that takes an adequately capacious view of costs.

Finally, the analysis thus far looks at the cost/benefit question exclusively from an institutional perspective, ignoring the dual perspective that the history of senior status suggests is appropriate. In particular, it ignores the perspective of the individual judge in senior status. As a respondent to one of our questionnaires observed,

> For senior status to 'work' as intended, both for the courts and the individual judge, the judge must continue to feel part of a common judicial effort. This means that senior judges must continue to be afforded the support necessary to practice at peak efficiency (or whatever reduced efficiency suits the judge).[330]

Both the extraordinary sensitivity of judges in senior status to financial incentives revealed by the FICA experience in the 1980s[331] and responses to our senior status questionnaire suggest that Congress could repair much of the damage caused by the compensation policy and practices of the past two decades by providing for federal judges in general to regain and hold ground lost to inflation. This solution would involve, first, increasing federal judicial salaries by the amount necessary to restore the purchasing power that judges have lost, and, second, making the changes necessary to ensure that federal judges received COLAs automatically in the future.

In doing so, Congress would repair both financial damage and damage to morale caused by the perception of repeated breaches of faith arising from the pre-enactment history of the Ethics Reform Act of 1989. In the process, it would also avert some of the perverse incentives caused by current compensation policy and practices, such as the influence of that policy and those practices on some judges to take senior status before they

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329 *See supra* text accompanying note 133.

330 Letter from a district judge to S. Jay Plager, Circuit Judge, United States Court of Appeals for the Federal Circuit (July 2, 2010) (on file with authors).

331 *See supra* text accompanying notes 132-34.

would prefer to do so; on other judges, seeking income from teaching, to provide less judicial service than they would be willing and able to provide; and on still other judges to remain in senior status and seek annual certification past the point that they should stop working at the required level.

Our study reveals that, apart from compensation, some nonfinancial policies and practices may influence decisions to leave or forego senior status for retirement, or to remain in regular active service. We understand that the judiciary has decided to revisit the question whether chambers and staff criteria should vary geographically or whether there should be national standards.[332] We also understand that there are plausible arguments for each system. Reconsideration seems warranted in light of the goal of "increas[ing] the flexibility of the judiciary in matching resources to workload." That goal might be better served by national than by regional or local criteria for assigning chambers and staff, particularly when judges in senior status are responsible for so much of the work accomplished through intercircuit assignment. Regional or local choices about matters consequential to the career choices of federal judges may also have national consequences. At the same time, there may be enough variation in workload, staffing, availability of judges, and other factors that flexibility in accommodating regional or local conditions should be incorporated into any national standards.

As we have noted, space and staff are of greater concern to district judges than to circuit judges because for the former, "space" includes courtrooms and "staff" includes courtroom staff. Courtroom sharing for district judges in senior status in new courthouse construction is already Judicial Conference policy.[333] Particularly since the extent of such construction going forward is in doubt, the more insistent question is what measure, if any, of courtroom sharing should be required for existing courthouses. For some courts (typically with newer courthouses), the matter does not come up. For others, space demands are such that all district judges must share courtrooms. We cannot object to a child of necessity.

What should be of concern is the possibility that, as a result of cost-cutting pressures, existing capacity might be taken offline, with concomitant demands for more court sharing by district judges in senior status.[334] With all the attention given in recent decades to the importance of a firm,

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332 We implied a similar question about using anything other than a national standard as the denominator for certifying eligibility for salary increases. *See supra* text accompanying note 164.

333 *See supra* text accompanying note 176.

334 *See Hard Choices*, *supra* note 324, at 11.

credible trial date, in a landscape where civil trials are already an endangered species, and given the high percentage of all trials for which judges in senior status have been responsible in recent years, it would be hard not to see such a move as another signal that trial, even when covered by the Seventh Amendment, is disfavored. That may already be the message if there are courts in which status as a district judge in senior status adversely affects entitlement to courtroom space or staff, even if that judge is carrying a full workload. No wonder that a respondent to our active judge questionnaire reported a culture against assuming senior status because "[t]here is a perception, whether true or not, that one becomes a second-class-citizen at that juncture."[335]

It appears plain that the equality urged by the 1995 Long Range Plan has yet to be uniformly achieved. Prejudicial treatment concerning courtroom sharing and courtroom staff is one area of concern. As another, even though that plan urged that no distinction be made in the titles used by judges in regular active service and judges in senior status (unless the judge in senior status so desired), "Senior Circuit Judge" is still used as the designation in written opinions in a few circuits. More important, responses to our questionnaire revealed that some judges in senior status—not many and concentrated in a few circuits—believe that they have been treated inappropriately.[336] Responses to the active judge questionnaire similarly revealed that some others—again, not many—have remained in regular active service at least in part because of the fear of prejudicial treatment if they were in senior status.[337] These comments and concerns may deserve further inquiry.[338]

Determining whether there is evidence of abuse in the exercise of the designation and assignment power requires formulating the concept of "abuse." Chief judges, circuit or district, have no power to insist on any amount of work from judges in senior status, although the latter may be denied chambers and staff if they are not doing "substantial judicial work."[339] As noted previously, the 1944 legislation clarifying the designation and assignment requirement was prompted by attention to problems that could arise if, as had been reported, judges in senior status sought to

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335 Responses to Sept. 1 Letter, *supra* note 182.

336 *See supra* text accompanying note 224.

337 *See supra* text accompanying note 269.

338 *See supra* text accompanying note 223.

339 Here, of course, is where transparency about how to meet that standard can serve the interests of individual judges.

perform judicial services that were not needed, or if there were no prior opportunity to coordinate their work with that of judges in regular active service.[340]

That rationale could justify a refusal to designate and assign predicated on considerations of need or the imperatives of logistics. In addition, understanding that judges may not be the best judges of their own physical and mental limitations, we can accept some latitude for a chief judge, in consultation with the circuit judicial council, to rely on the designation and assignment power to avoid problems arising from mental or physical disabilities that, if not addressed, would otherwise require formal circuit judicial council action.[341]

That is all a far cry, however, from Judge Posner's notion that judges in senior status serve "essentially at the pleasure of the chief judge and of the judicial council of the circuit."[342] Continuation in office provides more than a guarantee against diminution of compensation. At the least, it entitles judges holding office under Article III, whether in regular active service or in senior status, to protection against administrative action that is not firmly rooted in institutional needs or in objectively demonstrable disabilities or infirmities. In particular, the designation and assignment power cannot justify chief judge or council decisions that are influenced by personal animosity or political considerations.

We have raised the question whether a high ratio of judges remaining in regular active service or retiring (to authorized judgeships) is evidence of a perception of prejudicial treatment of judges in senior status, but we understand that there are other possible explanations. We have also raised the question whether there is a connection between a culture that disfavors en banc proceedings and one that favors assuming senior status promptly after eligibility. Given the importance of service in senior status not just to the federal judiciary but to the country, we need to understand any such connection, as well as the role that current policies and practices play in discouraging judges from assuming senior status.

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340 *See supra* text accompanying notes 93-95.

341 *Cf.* Jeffrey N. Barr & Thomas E. Willging, *Decentralized Self-Regulation, Accountability, and Judicial Independence under the Federal Judicial Conduct and Disability Act of 1980*, 142 U. PA. L. REV. 25, 136 (1993) ("For a senior judge, the prospect that the chief judge of the circuit might refuse to certify the judge as eligible to continue receiving the salary of the office presents an equally strong reason to accede.").

342 POSNER, *supra* note 36, at 8.

Finally, if we were asked to recommend one relatively simple step that would enable the judiciary itself to begin to address the many questions that this study has raised, it would be to institute a professionally administered exit interview program. Every judge who indicated the intention to resign or retire (with or without having first assumed senior status) should be asked to participate in an in-depth interview, answering the kinds of questions we have found productive in this study, as well as others developed over time. Interviews could also be conducted of judges who take senior status or remain in regular active service for more than three years after becoming eligible to assume senior status or retire; if that requirement proved too burdensome, a sampling of interviews, perhaps supplemented with questionnaires, might suffice.

Looking ahead, it is vital that the judiciary have reliable information about why judges are leaving the bench, or choosing not to. The collection of these important data should not depend upon occasional comments to newspaper reporters, or the chance interests of researchers. A central database built on the best available information is essential to the development of sound policies and practices affecting federal judges. We hope that this work is a constructive beginning toward that end.